IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, *Appellant*,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of Arizona, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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APPENDIX

Docket Entries

1964

Apr. 27—1. File Complaint.

Apr. 27—Issue Summons.

Apr. 27—It appearing this case should have been filed in the Phoenix Division, ent. order transferring this case to the Phoenix Division of this Court.

May 4—2. File Summons with Marshal's returns showing service made upon the State of Arizona; Paul Fannin, Governor, by serving the Attorney General; Wesley Bolin, Ariz. Secretary of State, on April 29, 1964.

May 6—3. File Order of Chief Circuit Judge Chambers designating Circuit Judge Walter L. Pope, and District Judges James A. Walsh and William C. Mathes to hear this cause. RHChamb

May 8—4. File Pltf's Request for Admission of Facts.

May 13—5. File Motion to Intervene as party Defendant by Norman E. Green.

May 13—6. File Proposed Answer in Intervention.

May 13—7. File Norman E. Green's Motion to Dismiss.

May 13—8. File Norman E. Green's Memorandum of applicant for intervention in support of Motion to Intervene and Motion to Dismiss.

May 15—9. File Norman E. Green's Notice of Hearing Motion to Intervene as Party Deft. on June 1, 1964 at 10 a.m.

May 19—10. File Defendants' Objections to Requests for Admissions.

May 19—11. File Defts' Motion to Dismiss for Failure to State a Claim upon which relief can be granted.

May 19—12. File Motion to Dismiss by deft State of Arizona, with Memorandum for failure to state claim.

May 19—13. File Motion to Dismiss by defts State of Arizona, Hon. Paul Fannin, Governor, and Hon. Wesley Bolin, with Memorandum. (failure to join indispensable parties)

May 20—14. File Motion to Dismiss by State of Arizona, with Memorandum, for lack of jurisdiction.

May 21—15. File Substitution of Sheldon Mitchell as attorney for plaintiff.

May 27—16. File Pltf's First Amended Complaint.

June 3—17. Enter and File Order of Three Judge Court that the Clerk of the Court is directed to notify counsel that this court will not assemble for the purpose of hearing motions to dismiss the complaint and other pending matters herein until after the Supreme Court cases have been decided and a period of time necessary for adequate study of the same has expired.

WLP:WCM
WLP:WCM:JAW

June 4—Copies of above Order mailed to counsel.

June 12—18. File Pltf's Motion to vacate order for continuance and to order a separate and immediate trial of those issues raised by the first cause of action in Pltf's amended complaint, with Memoranda of law in support.

June 24—19. File Defendants' Memorandum.

June 25—20. Enter and File Order that Pltf's Motion to Vacate Order for Continuance and to sever for Trial is

hereby denied; and all proceedings in this action are stayed until the expiration of a period of 30 days next following adjournment of the next session of the Legislature of the State of Arizona, or until further order of Court.
WLP:JAW

June 25—21. File Court's Opinion on Order Staying Proceedings.

1965

Apr. 8—22. File Stipulation that pltf's Second Amended Complaint may be filed.

Apr. 8—23. File Pltf's Second Amended Complaint.

Apr. 21—24. File Substitution of Felke, Simon & Henderson as attorneys of record for plaintiff, in place and stead of Sheldon Mitchell. (Pltf. Klahr only).

Apr. 26—25. File Deft's Motion to Set for Pretrial and Trial.

Apr. 29—26. File Plaintiffs' Opposition to Defts' Motion to Set for Trial and Plaintiffs' Motion to Set trial at earlier date.

Apr. 29—27. File Controverting Certificate to Defts' Motion to Set for pretrial and Trial.

Apr. 29—28. File Pltf's Motion for leave to amend complaint, with proposed order and Affidavit and copy of proposed second amended complaint.

Apr. 29—29. File proposd Third Amended Complaint by Pltf Gary P. Klahr.

May 18—30. Enter and File Order that defendants' motion to Set for Pretrial and Trial is denied; and pretrial hearing and trial of this cause are deferred until conclusion of the special session of the Arizona Legislature hereinbefore mentioned, or until further order of the Court; It is Ordered, further, that Samuel P. Goddard,

Governor of the State of Arizona, is substituted as a deft herein in the place and stead of Paul Fannin, former Governor; that pltf Gary Peter Klahr's Motion for leave to file an amended complaint, filed April 29, 1965 is granted, the amended complaint tendered with the Motion to be captioned "Third Amended Complaint"; that defts may have 10 days from this date within which to answer or otherwise plead to pltfs' Third Amended Complaint; that the document filed herein on April 29, 1965, on behalf of Jenne Lipton and Clara Halverson, and styled "Plaintiffs' Motion to Set Trial at Earlier Date", is stricken from the record upon the ground and for the reason that said Jenne Lipton and Clara Halverson are not parties pltf in this action, no order of the Court adding them as parties having been entered in this action. WLP:WCM & JAW

May 19—Conformed copies of above Order mailed to Attorney General; John P. Frank; Sheldon Mitchell and Felke et al.

May 18—29a. File Pltf's Third Amended Complaint.

June 1—31. File Pltf's Affidavit of Failure to Plead and Re Military Service in Support of Application for Entry of Default, Application, and Proposed Default.

June 2—32. File Deft's Motion to Dismiss.

June 7—33. File Pltf's Motion to Quash or strike defts' Motion to Dismiss, with Memorandum.

June 11—34. File Attorney General's ANSWER to third amended complaint.

June 21—35. File Motion of Petitioners Jenne Lipton and Clara Halverson to join additional plaintiffs, with Petition in support.

June 24—36. File Pltf's Memorandum in opposition to Jenne Lipton's and Clara Halverson's Motion to join additional pltfs.

July 14—37. File Defts' Response to Motion to join additional pltfs.

July 30—Minute Entry: It is ordered that the Motion to Quash or Strike Defts' Motion to Dismiss, and the Motion to join additional pltfs, will be disposed of at the Pre-trial hearing which will be held hereafter in this case. JAW

July 30—Notice mailed to Felke, Simon & Henderson; Lewis Roca et al; Philip M. Haggerty; Shelton Mitchell.

Oct. 11—Pre-trial conference is set for Wed. Oct. 13, 1965 at 11:00 a.m. JAW

Oct. 11—Notice of pre-trial conference mailed to counsel.

Oct. 13—38. File Application of Larry E. Mills, Nicholas C. Ragus and Hal F. Butler to Appear as Amicus Curiae.

Oct. 13—J. Stephen Simon and Larry Henderson pres. for pltf. John F. Frank, Philip M. Haggerty, Leslie Hardy and John McGowan for defendants. Sheldon Mitchell pres. for Petitioners Jenne Lipton and Clara Halverson. Thomas C. Foster present on behalf of Jack Cavness and now presents Application of Larry E. Mills, Nicholas C. Ragus and Hal F. Butler to Appear as Amicus Curiae. Mr. Foster is directed to file said application with the Clerk of the court. (Mr. Foster not present during pre-trial conf.). It is ordered that Motion of Norman Green to intervene in this case as a party defendant is denied, and the Clerk is directed to send notice to Mr. Green's counsel, Lawrence Ollason, Tucson, Arizona. It is ordered that Motion of Petitioners Jenne Lipton and Clara Halverson to Join as Additional Plaintiffs in this case is denied. (Mr. Mitchell now departs). PRE-TRIAL CONFERENCE NOW HAD. Defendants withdraw all motions to dismiss heretofore filed in this action, except their motion to dismiss the action as to Defendant Samuel P. Goddard which is contained in Paragraph 26 of the Answer to the Third

Amended Complaint. It is ordered that Plaintiff's Motion to Strike or Quash Defendants' Motion to Dismiss is denied.

Oct. 13—(Cont'd.) Mr. Frank moves that this action be dismissed as to Deft. Samuel Goddard. Said motion argued. The Court reserves ruling on Defts'. Motion to Dismiss action as to Defendant Goddard, and the same is taken under advisement by the Court. Counsel are directed to submit any redistricting proposals and Senate Bill #11, in quadruplicate, to the Court within 10 days from this date. It is ordered that this case be continued for further pre-trial on Saturday, October 30, 1965 at 10:00 a.m. at Phoenix, for presentation and marking of exhibits. All exhibits are to be furnished in quintuplicate, if practicable. Each party to submit briefs, same to be filed, in quintuplicate, and served on the other side, on or before November 8, 1965. Counsel will also present a list of witnesses and general summary of their testimony on October 30, 1965. It is ordered that this case be and it is set for trial November 18, 1965 at 9:00 a.m. at Phoenix.

Oct. 21—39. Enter and file Pretrial Hearing report of Oct. 13, 1965. JW

Oct. 22—40. File Pltf's proposed plan for Congressional and Legislative District.

Oct. 29—41. File Association of Counsel for Plaintiff, and enter and file order associating Evans, Kitchel & Jenckes as counsel for plaintiff.

Oct. 30—On for further pre-trial conference. J. Stephen Simon, Larry Henderson and David West, pres. for pltf. Philip M. Haggerty, John P. Frank and Allan J. Stanton pres. for defts. Exhibits are now marked for identification: Pltf's. Exhibits 1 thru 59 and Defts' Exhibits A thru AH, AK thru AQ (Defts'. Exhibits AI and AJ will be furnished later. On motion of Mr.

Frank, It is ordered that a better copy of Defts'. Exhibit AR may be substituted at a later date. Pltf's. counsel requests permission to file typed brief in lieu of printed brief; said request is granted. Counsel are instructed to mail briefs to Judge Walsh on or before Novembr 8, 1965. JW

Oct. 30—42. File Plaintiff's List of Exhibits.

Oct. 30—43. File Plaintiff's Tentative Witness List.

Oct. 30—44. File Defendants' Pretrial Memorandum containing Witnesses and Exhibits.

Oct. 30—45. File Defendants' Motion to Strike Congressional Alternatives.

Nov. 4—46. File Pltf's Reply to defts' Motion to strike congressional alternatives.

Nov. 8—47. File Brief of defendants.

Nov. 8—48. File Brief of Plaintiffs.

Nov. 18—Minute Entry: On for Trial. Pltf. Pres. in person with his counsel J. Stephen Simon, Larry Henderson, and David West. John P. Frank, Philip M. Haggerty, John McGowan and Dave Schutter pres. for defts. Both sides announce ready for trial. Jack Cavness now urges Application of Larry E. Mills, Nicholas C. Ragus and Hal F. Butler to appear as Amicers Curiae. Granted. Mr. Cavness advised that any argument he may have at the conclusion of this case may be submitted in writing. Mr. Frank now moves that the matter of admission of all exhibits in evidence be ruled on by the court. It is ordered that Pltf's Exhibits 1 to 59, inclusive, and Defts' Exhibits A to Z and AA to AT, inclusive are admitted in evidence, with exception of Defts' Ex. AI, subject to ruling on any objections. Opening statements are made by Mr. Simon and Mr. Frank. At 5:30 p.m. order recess to 9 a.m. Friday, Nov. 19, 1965.

Nov. 19—Minute Entry: Enter further proceedings of trial. All present as before. Pltf rests with right to call one witness during defts' case. So ordered. Mr. Frank now renews defts' Motion to Dismiss this case as to deft Samuel P. Goddard. Several motions for Summary Judgment were urged by Mr. Frank as will fully appear in the court reporter's notes. It is ordered that all motions urged by Mr. Frank are denied, with the exception of Defts' Motion to Dismiss as to deft Samuel P. Goddard which is taken under advisement. John Frank now renews all motions previously made this date, it is ordered that previous rulings stand. It is ordered that record show this case is submitted and taken under advisement. Each party instructed to file

Nov. 19—Cont'd simultaneously proposed Findings of Fact and Conclusions of law, and proposed form of judgment within 10 days. Mr. Simon is to file additional Exhibit setting forth ratio of registered voters and population as of 1964, said exhibit to be marked Pltf's Exhibit 11-A.

Nov. 26—File Pltf's. Exhibit 11-A. (Copy mailed to Judge Pope and to Judge Mathes by Dave West of Evans, et al and copy mailed to Judge Walsh by Clerk)

Nov. 29—49. Lodge Pltf's. proposed Findings of Fact and Conclusions of Law.

Nov. 30—50. Lodge Pltf's. proposed Judgment.

Nov. 30—51. Lodge Defts'. Proposed Findings of Fact, Conclusions of Law and Judgment.

Nov. 30—Copies of Pltf's. proposed Findings of Fa t, Conclusions of Law and Judgment mailed to Judge Walsh, in triplicate, for mailing to Judge Pope and Judge Mathes. Defts'. Proposed Findings of Fact, Conclusions of Law and Judgment were mailed, in quadruplicate, to Judge Walsh by Mr. John Frank on 11/29/65.

Dec. 27—52. File supplemental citations by atty John P. Frank.

Dec. 27—Copies of supplemental citations mailed to Mr. Simon; Evans Kitchel et al and Judge Walsh.

1966

Feb. 2—53. File Opinion of Circuit Judge Walter L. Pope and District Judge James A. Walsh.

Feb. 2—54. File Dissenting Opinion of Judge Wm. C. Mathes concurring however in the majority opinion in denial of defendants' motion to dismiss action as to the Governor).

Feb. 2—55. File Findings of Fact, Conclusions of Law and Decree of the Court.

Feb. 2—56. Enter and file Judgment and Decree: that Art. 4, pt. 2 Sec. 1 of Const. of State of Ariz., and the Act of spec. session of Legislature, Senate Bill 11 and Sec. 16-727 of Ariz. Revised Statutes of 1956, to the extent that the same are in conflict or not in conformity with reapportionment plan and the redistricting plan set forth in findings and conclusions herein, are void and unconstitutional and in vio. of the Equal Protection Clause of the Fourteenth Amendment to Const. of the U.S. or void under Art. 1 Sec. 2 of said Constitution; and the defts. herein are perpetually enjoined from in any manner enforcing or recognizing the same and from conforming thereto and no member of Congress and no Legislature of State of Ariz. shall hereafter be elected or constituted as provided in said void portions of said sections; That there shall be and there is hereby established a system of congressional districts for the State of Arizona—Congressional district No. 1 shall comprise a certain part of the County of Maricopa; Congressional district No. 2 shall comprise the same counties presently provided for in Sec. 16-727 of Ariz. Rev. Stat. of 1956; Congressional district No. 3 shall

comprise the counties of Apache, Coconino, Gila, Graham, Greenlee, Mohave, Navajo, Yavapai, and that portion of Maricopa County not included within Congressional district No. 1; that defts. are enjoined from preparing, certifying or conducting any election of the members of State Legislature in any manner other than as set forth in the findings or conclusions herein and are enjoined from making any proclamation inconsistent with the direction of the court; nomination petitions and papers for offices and positions shall be filed with the Secretary of State as provided by Sec. 16-301 of Ariz. Rev. Stat. and not otherwise; the returns after canvass by board of supervisors of votes at elections for said offices shall be certified to Sec'y. of State as provided in Sec. 16-984 and 16-571, and same shall be canvassed by Sec'y. of State in manner provided by Sec. 16-991 and 16-571, and certifs. of nomination and election shall be issued by Sec'y. State as provided in Sec. 16-992 and 16-5781, of Ariz. Revised Statutes regardless of whether the person so elected is voted for in one or in more than one county; that Maricopa County and Pima County shall be divided into sub-districts, fifteen sub-districts shall be established in Maricopa County to be as nearly equal in population as possible and composed of continguous areas, each party hereto

Feb. 2—(Cont'd) is directed to file herein within 30 days after filing of this decree, proposals for plan for subdividing Maricopa County to be based upon 1964 voter registration figures or other available statistics; Six sub-districts shall be established in Pima County in like manner, plans or proposals for Pima County subdivisions to be filed in same manner re Maricopa County; after examination of said plans the court will supplement and modify this decree so as to incorporate a definition of the boundaries of such sub-districts; one Senator and two Representatives shall be elected from each

of said sub-districts; in all other cases, the Senators and Representatives from legislative districts shall be elected at large from their respective districts; that the foregoing reapportionment of both Houses of Arizona Legislature and directions and requirements relating thereto, is ordered into effect for the purposes here stated; the defendants etc. are ordered and directed to accept filings and conduct elections in accordance with provisions of this decree and are enjoined and restrained from accepting filings or conducting elections in any manner inconsistent with the provisions of this decree; that this court retains jurisdiction until after said Legislature to be elected, in 1966, shall have taken office and concluded its first annual session; such jurisdiction is retained for purpose of passing upon aforesaid proposals for sub-districts and of adjudging and passing upon validity of any plan of reapportionment or plan for redistricting enacted by said succeeding legislative session and to compel compliance with this decree and the constitutional provisions herein referred to. WLPope and JAWalsh 2/2/66

Feb. 24—57. File Plaintiff's proposed plan for subdividing Pima County, Arizona into Legislative Districts.

Feb. 24—58. File Stipulation of parties as to proposed plan for sub-dividing Maricopa County, Arizona into Legislative Districts.

Mar. 4—59. File Motion of Attorney General to review the specific state election statutes, with proposed first supplemental decree.

Mar. 4—60. File Submission of defts' proposed plan for the redistricting of Pima County in accordance with the decree of the court.

Mar. 4—61. File Submission of the proposed plan for subdividing Pima County, Arizona into Legislative District by William D. Baker.

Mar. 4—62. File Supplemental exhibits to pltf's proposed plan for subdividing Pima County, Arizona into Legislative District.

Mar. 4—63. File Supplemental exhibit to proposed plan of parties for subdividing Maricopa County, Arizona into Legislative Districts.

Mar. 14—64. Enter and File First Supplemental Decree adopting stipulated reapportionment plan for Maricopa County and Pltf's reapportionment proposal for Pima County. WL Pope

Mar. 14—Copy of Decree mailed to all counsel. JAW

Mar. 25—65. Enter and File Order amending and correcting first supplemental Decree, that said Decree be amended to correctly spell the name "Hopi" precinct; and the Clerk is directed to forthwith make such amendment by interlineation instead of "Hope".

Pope & Walsh

Mar. 25—Copy of Order mailed to counsel.

Nov. 10—Conference held before Hon. James A. Walsh for purpose of discussing appropriateness of a proposed interim order pending future action by the Legislature of the State of Arizona.

Dec. 5—66. File motion pursuant to authority set out on page 17 of Decree, to review specific state of election statutes, etc., and lodge proposed second supplemental decree.

Dec. 5—67. Enter and file Second Supplemental Decree, signed by Judge Pope and Judge Walsh.

Dec. 5—Copy of Second Supplemental Decree mailed to counsel for both sides.

1967

May 8—68. File Pltf's Motion for the Court to order the defts to conduct the next and all subsequent primary and regular general elections for the Members of the

May—8 Cont'd State Senate, State House of Representatives and U. S. House of Representatives from the State of Arizona, in a manner whereby each person seeking said offices will "run at large" within the State of Arizona, and to enjoin the defts from conducting any such election under the provisions of the State election laws which have been declared unconstitutional by the Court.

May 23—69. File Defts' Response to Plaintiff's Motion.

June 7—70. File Petition of Richard Duffield in His individual Capacity and as Chairman of the Democratic Party of Arizona and the Democratic Party of Arizona for Permission to Intervene as Parties and Motion to Declare unconstitutional House Bill 1 of the First Special Session of the 28th Legislature of the State of Arizona, or in the Alternative to File Amicus Curiae Brief.

June 23—71. File Pltf's Motion that the Court grant his prior motion that the members of the House of Representatives run at large for the year 1968 and for future elections until such time as the State Legislature assumes its Constitutional responsibility and passes into law a new valid re-districting plan.

June 28—72. File Motion of John P. Frank, of defense counsel, for leave to withdraw.

June 28—73. File Defts' opposition to petition of Richard Duffield to intervene as a party herein.

July 14—74. File Supplemental Exhibits submitted by

Aug. 2—75. File cert. copy of order of court of appeals' Chief Judge designating Hon. Walter L. Pope, Hon. James A. Walsh and Hon. Walter E. Craig to hear and determine cause no. Civ-5112 and all motions and proceedings, superseding order of May 4, 1964.

Dec. 4—76. Enter and File Order that the motion of pltf filed herein on May 8, 1967, asking that the court require defts to conduct future primary and general elections in such manner that candidates for the Arizona Legislature and for the National House of Representatives from Arizona will run "at large", is denied; that ruling on the petition of Richard Duffield, individually and as Chairman of the Democratic Party of Arizona, and the Democratic Party of Arizona to intervene as parties herein is deferred until such time as Chapter 1, 28th Legislature, First Special Session, becomes law, if it should become law; that the Decree entered herein on Feb. 2, 1966, and the First and Second Supplemental Decrees entered on March 14, 1966 and Dec. 5, 1966, respectively, redistricting the Congressional districts of Arizona and reapportioning both Houses of the Arizona Legislature shall apply to and govern primary, general, and special elections which may be held hereafter until the legislative authority of the State of Arizona shall have adopted different, valid and effective plans for redistricting and reapportionment, or until the further order of the Court.

1968

Nov. 27—77. Enter and File Order that leave is granted to Richard Duffield, individually, and as Chairman of the Democratic Party of Arizona, to intervene as a pltf. in this action.

Nov. 27— Copies of order mailed to Judges and to Attorneys.

Dec. 6—78. File Supplemental Exhibit submitted by the defendants.

Dec. 6— Copies mailed to Judge Craig and Judge Pope by Judge Walsh.

Dec. 6—79. Enter and File Order that a hearing as to the validity of Chap. 1, Twenty-eighth Legislature, First Special Session, is set before the Court in Phoenix, Arizona, on Jan. 17, 1969 at 10 a.m.; further ordered that Intervenor Richard Duffield file and serve his hearing brief on or before Dec. 31, 1968 and that the other parties to the action file and serve their hearing briefs on or before Jan. 13, 1969.

Dec. 6—Copies of order mailed to parties and judges.

Dec. 30—80. File Intervenor Richard Duffield's memorandum. (copies mailed to judges)

1969

Jan. 13—81. File Pltf's Brief. (supplementing prior memo) (copies for 3 judges)

Jan. 13—82. File Deft's hearing brief. (Eubank mailed copies to judges)

Jan. 17— Minute Entry: This case called for hearing as to the validity of Chap. 1 Twenty-eighth Legislature, First Special Session. Following counsel pres: J. Steven Simon, Herbert Ely, Robert L. Ecuyer, William Eubank and John McGowan. Enter proceedings of hearing. File Intervenor's Exhibits 1 thru 5, 6 & 7, 8, 9 & 10. It is ordered that said matter is submitted and taken under advisement. Preporter's transcript to be furnished to the Court. At 5:35 p.m. order recess.

Feb. 13—83. File Reporter's Transcript of proceedings, dated Jan. 17, 1969.

Apr. 7—84. Enter and File Second Amended Order des
nating Hon. Gilber M. Jertberg, Hon. James A. Wal
and Hon. Walter E. Craig to hear and determine th
action.

Apr. 7— Copies of order mailed to, the Attorney Gener
Jelke et al, Gorey et al and John P. Frank.

Apr. 29—85. File Pltf's Motion to Reconsider Orde
Judgements and Decrees with memo.

May 7— Minute entry: It is ordered that the Motion
John P. Frank for Leave to Withdraw as counsel f
Defendant is granted. (copy mailed to all counse

May 14—86. File Intervenor's Response to Motion
Pltf.

May 28—87. File Deft's Response to Pltf's Motion a
reply to response of intervenor.

July 22—88. Enter and File OPINION and DECISION
the Three Judge Court per curiam that Pltf's reque
for an order that defts conduct the 1970 and all su
sequent primary and general elections for the offic
of Representatives in Congress, State Senator, a
State Representative in a manner whereby the ca
didates for such offices will "run at large" within th
State of Arizona, said Judges decline to enter suc
an order at this time, that pltf may renew his reque
for relief, since the same will be within our co
tinuing jurisdiction.

July 22— Copies of opinion and order mailed to couns
from Judge Walsh's office this date.

Aug. 8—89. File Defts' Application for more specific d
rections.

Sept. 3—90. File Intervener's Response to defts Applic
tion for more specific directions.

Sept. 19—91. Enter and File Order Per Curiam that the Application of defts "For More Specific Directions" is denied.

Sept. 19— Copies of order mailed to counsel by Judge Walsh.

Dec. 19—92. File Notice that the intervenor-pltf Richard Duffield, individually and as Chairman of the Democratic Party of Arizona hereby associates as counsel in this action with Gorey and Ely, Robert A. L'Ecuyer.

1970

Jan. 29—93. File intervenor-pltf's notice of taking the depositions of Paul N. Marston and Michael J. Farren.

Jan. 29.—94. File Motion of intervenor-Pltf; and Enter and File Order that Philip J. Shea is substituted for Herbert L. Ely and Robert A. L'Ecuyer as the attorney for the Intervenor-Pltf. (copies for Judges)

Feb. 17—95. File Supplemental exhibit submitted by defts. (copies for judges)

Feb. 20—96. File Intervenor-Pltf's notice of substitution of Herbert L. Ely for Richard Duffield as the Intervenor-Pltf.

Feb. 20—97. File Intervenor-Pltf's Motion for hearing on the constitutional validity of the Act. (2 days) (copies of judges)

Mar. 5—98. Enter and file Order that a hearing with respect to the constitutionality of Chap. 1, 29th Legislature, First Special Session, State of Ariz. and matters germane thereto, will be held in this cause on April 16, 1970 at 10 a.m. in Courtroom 1. Copies for 3 judges

Mar. 5— Copies of Order mailed to Philip Shea, J. Stephen Simon, John M. McGowan and Evans et al.

Apr. 19—99 File Intervenor-Pltf, Herbert L. Ely's trial memorandum with (80a) 4 charts in large roll. (Exhibit room)

Apr. 14—100. File Pltf's Motion for reconsideration and Brief. (copies for judges)

Apr. 16—101. File Deposition of Paul Norman Marston.

Apr. 16—102. File Deposition of Senator Michael J. Farren.

Apr. 16—103. File Statement concerning congressional districting, by Congressmen Rhodes and Udall.

Apr. 17—104. File Supplemental memo Re Congressional Districting, by Congressmen Rhodes and Udall.

Apr. 17— Docket Minute Entry of April 16, 1970: Gary Peter Klahr pres, with Stephen J. Simon and Louis G. Jekel, Jr. John McGowan, Frank Sagarino and Gary Nelson pres. for defts. Herbert L. Ely, intervenor pltf. pres. with Philip Shea. John P. Frank requests leave to appear on behalf of Congressmen Rhodes anl Udall. Permission granted. Enter proceedings of hearing. Judge Walsh orders copy of transcript of the proceedings as soon as conveniently possible. The Court requests desk copies of defts' Exhibits A, B, C, D, E and F. File defts' exhibits A, B, C, D, E, and F. File defts' exhibits A, B, C, D, E and F. and Pltf. Intervenor's exhibit 1. At 4:45 p.m. order recess to Apr. 17, 1970 at 9:30 a.m.

Apr. 17—Minute Entry: Enter further proceedings of hearing. Counsel pres. Stephen J. Simon. Philip Shea, John McGowan and Garry Nelson. File Pltf. Intervenor's exhibts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13. It is ordered that this case is submitted and taken under advisement. At 3:10 p.m. order recess.

Apr. 27—105. File Reporter's Transcript of proceedings held at Phoenix on April 16 and 17, 1970. (orig. to Judge Craig, copy to Judge Walsh and Judge Jertberg.

Apr. 28—106. File Defts' Submission of Exhibits A, B, C, D and E in small desk size photographs, (brown envelope); A County Code Sheet—Apache County; Computer Sheets; and large Map. (roll) (copies of each for 3 judges)

May 19—107. File Courts' Memorandum OPINION, Findings of Fact, and Conclusions of Law.

May 19—108. Enter and File Third Supplemental Decree that: I. The reapportionment plan and redistricting plan set forth on Feb. 2, 1966 are presently unconstitutional II. That because of the imminence of the 1970 Arizona elections, the Court of Arizona Members of Congress and members of the Legislature. III. The Thirtieth Legislature, State of Arizona, shall consist of 30 members of the senate and 60 members of the house of representatives. The legislative districts of the 30 Legislature shall be as set forth in Chapter 1, and at the Arizona elections held in 1970, 1 senator and 2 representatives shall be elected from each legislative district. IV. The congressional districts from which the Members to the House of Representatives from Arizona shall be selected in 1970, to serve in the 92nd Congress of the United States, shall be as set out in Chapter 1. V. The respective boards of supervisors of Arizona are authorized, until June 1, 1970, to adjust the boundaries of precincts within a legislative district in order to provide convenient polling places for voters. VI. Except to the extent they are inconsisttnt herewith, the terms and provisions of the decree entered herein on Feb. 2, 1966, and the terms and provisions of the supplemental decrees entered on

March 14, 1966, and Dec. 5, 1966, respectively, shall remain in force and effect until the further order of this court. VII. The court, having been advised that detailed population figures for the State of Arizona will will be available from the official 1970 census by the summer of 1971, assumes that the Arizona Legislature will by Nov. 1, 1971, enact a valid plan of reapportionment for both houses. Upon failure of the Legislature to do so, any party to this action may apply to the court for appropriate relief. VIII. This court retains jurisdiction to fully carry into effect the foregoing. 3 Judges

May 19—Copies of opinion and order mailed to Botsford et al, Evans et al, Attorney General, Philip J. Shea and Lewis Roca et al.

Jun. 8—109. Enter and file order that each party shall bear his own costs, except that each party shall bear one-third of the cost of the reporters transcript in said cause.

Jun. 9—Copy of order mailed to Botsford, et al, Evans, et al, Attorney General, and Philip Shea.

June 18—110. File Notice of Appeal by Intervenor-Plaintiff to the Supreme Court the Third Supplemental Decree entered on May 19, 1970.

June 18—Copy of Notice mailed to Court Reporter, Evans et al and Lewis, Roca, et al

July 24—111. File Request for certification of record by attorney for appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Civ. No. 5112—Phx.

GARY P. KLAHR, *Plaintiff*,

v.

SAMUEL P. GODDARD, Governor of the State of Arizona; WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants*.

Second Amended Complaint

Plaintiff Gary P. Klahr, by and through his undersigned attorneys, on behalf of himself and all other persons who may be similarly situated, for his complaint herein, alleges:

I.

The issues set forth in this action and the questions herein to be litigated are of common and general interest to all of the voting population of the State of Arizona in exactly the same manner as this plaintiff is affected, and that such other persons are so numerous, amounting to several hundred thousands of individuals, that it is impracticable to bring all of said persons before the Court as individual plaintiffs, and that, therefore, this plaintiff sues for himself and for the benefit of all of the persons of the voting population of the State of Arizona.

II.

The defendants herein are subject to this cause of action in the Judicial District of Arizona and this Court has original jurisdiction in this action pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §§ 1983 and 1988.

III.

Plaintiff is a resident and citizen of Maricopa County, Arizona, and a duly qualified and registered voter in said County and State.

IV.

Defendant Samuel P. Goddard is a resident of Maricopa County, Arizona, duly elected and acting as Governor of the State of Arizona, and under the Constitution and laws of the State of Arizona his responsibilities and duties include being charged with the care that the laws of the State of Arizona be faithfully executed, being empowered to convene the Legislature of the State of Arizona in extraordinary session and being directed to communicate, by message, to said Legislature the condition of the State of Arizona and to recommend matters thereto, all of which responsibilities and duties are principally performed in Maricopa County, Arizona.

V.

Defendant Wesley Bolin is a resident of Maricopa County, Arizona, duly elected and acting as Secretary of State of the State of Arizona, and under the Constitution and laws of the State of Arizona his responsibilities and duties include being charged with the duty of canvassing the returns of the election for all State of Arizona officers, issuing certificates of election to such officers and notifying every four (4) years the board of supervisors of each county of the State of Arizona as to the number of state representatives each such county will be entitled to elect, all of which duties are principally performed in Maricopa County, Arizona.

VI.

Article 4, Part 2, Section 1(1), of the Constitution of the State of Arizona provides in part that the districts for members of the House of Representatives of the State of Arizona as determined by the board of supervisors of each county of said State shall have as nearly as may be an equal voting population, be compact in form and include no non-contiguous territory.

VII.

Article 4, Part 2, Section 1(1), of the Constitution of the State of Arizona provides in part the House of Representatives of the Legislature of the State of Arizona shall be composed of not more than eighty (80) members to be apportioned to the counties of the State of Arizona upon the basis of one representative for each county with the balance of the members of the House of Representatives apportioned to the counties upon the basis of the number of ballots cast in each county at the preceding general election for governor.

VIII.

Article 4, Part 2, Section 1(1), of the Constitution of the State of Arizona provides in part the Senate of the Legislature of the State of Arizona shall consist of two (2) members from each county of the State of Arizona elected at large.

IX.

Section 16-727B, Arizona Revised Statutes, 1956, provides the three (3) districts within the State of Arizona for the election to representatives in the United States Congress shall be as follows:

1. Congressional district number one (1) shall comprise Maricopa County, Arizona;

2. Congressional district number two (2) shall comprise Cochise, Pima, Pinal, Santa Cruz and Yuma Counties, Arizona; and

3. Congressional district number three (3) shall comprise Apache, Conconino, Gila, Graham, Greenlee, Mohave, Navajo and Yavapai Counties, Arizona.

X.

The 1960 United States Decennial Census for the State of Arizona shows the following populations with resulting

percentages of population for the aforesaid congressional districts:

Congressional District No. 1—663,510—51%
Congressional District No. 2—440,415—34%
Congressional District No. 3—198,236—15%.

XI.

The numbers of registered voters and the percentage of the total registered voters for the aforesaid congressional districts for the general election of November 2, 1964, were as follows:

Congressional District No. 1—332,513—55%
Congressional District No. 2—185,138—32%
Congressional District No. 3— 76,686—13%.

XII.

As hereinabove indicated by the allegations of paragraphs X and XI, Arizona Congressional District Number One (1) is comprised of over one-half (½) of the population and registered voters of the State of Arizona and yet under the aforecited law of the State has only one (1) of three (3) United States Representatives, while District Number Three (3) comprising only fifteen percent (15%) of the population and thirteen percent (13%) of the registered voters of the State of Arizona has nonetheless the same one (1) United States Representative as do Congressional Districts Number One (1) and Two (2).

XIII.

Under the aforecited law of the State of Arizona and upon the basis of the aforesaid 1960 Census as little as 12.9% of the population of the State of Arizona was able to elect a majority, actually sixteen (16), of the members of the Senate of the State of Arizona, and upon the basis of the number of registered voters for the 1964 General Election as little as 11.1% of the registered voters of the

State were able to elect a majority, actually sixteen (16), of the members of the State Senate. In determining the aforesaid percentage figures the only difference in the counties referred to was the substitution of Coconino County for Yavapai County in determining the percentage of registered voters that could elect more than a majority of Arizona State Senators.

XIV.

Upon the basis of the aforecited provision of the Constitution of the State of Arizona, Maricopa County, Arizona, which contained 50.9% of the population and 55.2% of the registered voters of the State (as indicated by the aforesaid 1960 Census and registered voter count), was entitled to forty (40) or 50% of the members of the Arizona House of Representatives, while Mohave County, Arizona, which contained only 0.6% of the population and 0.9% of the registered voters of the State, was entitled to one (1) or 1.3% of the members of the Arizona House of Representatives. Similar inequities appear upon comparison of the number of members of the Arizona House of Representatives apportioned to each of the various counties of the State under Article 4, Part 2, Section 1 (1), of the Constitution of the State of Arizona.

XV.

Upon the basis of the registered voter counts for the general election of November 2, 1964. Maricopa County, Arizona, State Representative Districts Number Five (5), Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20) and Twenty-six (26), has respectively voter registration counts of 11,099; 5,599; 6,211; 12,448; 6,310; and 11,670, while Pima County, Arizona State Representative Districts Number One (1), Three (3), Twelve (12) and Thirteen (13) had respectively voter registration counts of 3,432; 5,413; 8,342 and 11,471. Such laying out of the aforesaid and similar unequitable state representative dis-

tricts within the State of Arizona is unlawful as contrary to the provisions of Article 4, Part 2, Section 1(1) of the Constitution of the State of Arizona requiring that state representative districts shall have as nearly as may be an equal voting population.

XVI.

In numerous examples the state representative districts of the State of Arizona as presently designated are not compact in form (reference need only be made to the various county maps designating state representative districts) as required by Article 4, Part 2, Section 1(1), of the Constitution of the State of Arizona, but rather have been the subject of unlawful gerrymander.

XVII.

Under the laws of the State of Arizona the next regular general election will be conducted on November 8, 1966, and the primary election therefore will be conducted on September 13, 1966. The earliest date under law for the filing of nominating petitions for the aforesaid primary election is June 16, 1966. Further, pursuant to § 16-761A., Arizona Revised Statutes, 1956, election precincts for the 1966 general election must be established prior to December 1, 1965, and that any redistricting of congressional and legislative districts within the State of Arizona will in all probability require the establishment of new election precincts. A minimum reasonable period of time to provide for (i) the establishment of new election precincts and the organization of new congressional and legislative districts within the State of Arizona and (ii) to allow proper consideration by such persons who may desire to file as candidates for office is eight and one-half (8½) months, thus making the last possible date for determination of new congressional and legislative districts on or about October 1, 1965.

XVIII.

Under the aforecited discriminatory statutory and constitutional provisions of the State of Arizona designating the congressional and state legislative districts within the State of Arizona, plaintiff, as well as the class of persons herein represented by plaintiff, is deprived of the equal protection of the laws and his property right in voting without due process of law all as contrary to the guarantees the 14th Amendment to the Constitution of the United States and Article 2, Sections 4 and 13 of the Constitution of the State of Arizona, and is further deprived of equal representation in the House of Representatives of the United States contrary to the guarantees of Article 1, Section 2, and Section 2 of the 14th Amendment, of the Constitution of the United States.

XIX.

Section 16-727 B, Arizona Revised Statutes, 1956 and Article 4, Part 2, Section 1 (1) of the Constitution of the State of Arizona—as it provides for the election of two (2) state senators from each county, the apportionment of one (1) state representative for each county and the apportionment of additional state representatives to the counties upon the basis of the number of ballots cast in each county at the preceding general election for governor—are unconstitutional under the Constitution of the United States and the State of Arizona and are accordingly invalid.

XX.

Article 4, Part 2, Section 1 (1) of the Constitution of the State of Arizona requiring that state representative districts have as nearly as may be an equal voting population and be compact in form is presently being applied in an unauthorized manner, as hereinabove alleged, and, accordingly, plaintiff, as well as the class of persons herein represented by plaintiff, is deprived of the equal protection of

the laws and his property right in voting without due process of law all as contrary to the guarantees of the 14th Amendment to the Constitution of the United States and Article 2, Sections 4 and 13 of the Constitution of the State of Arizona.

XXI.

The aforesaid 1960 Census does not presently accurately reflect the population of the State of Arizona nor will there be another decennial census accurately reflecting the population of the State until the year 1970. The true voting population of the State of Arizona can readily be determined by reference to the voter registration lists of the State of Arizona.

XXII.

The State of Arizona is not now nor can it readily be divided into congressional and legislative districts which necessarily coincide with the decennial census tracts prepared for the State of Arizona.

XXIII.

The decennial census reflecting the population of the State of Arizona include persons who are not lawful members of the voting population of the State, and that within the decennial census counts of the State of Arizona there are aliens, felons, illiterates, persons non compos-mentis, minors, fluctuating military personnel and transients, including tourists, all of whom are not eligible to become lawful members of the voting population of the State of Arizona, but who are included in the population of the State of Arizona upon the conducting of decennial census.

XXIV.

In accordance with the foregoing allegations that to base the apportionment of congressional and state legislative

districts within the State of Arizona upon decennial census counts and not upon the basis of registered voters would deprive plaintiff, as well as the class of persons he herein represents, of his federal and state constitutional rights.

XXV.

In accordance with the foregoing, plaintiff, and the class of persons he herein represents, have been and are being irreparably injured, and do not have a speedy or adequate remedy at law to preclude the violation of their federal and state constitutional rights.

WHEREFORE, plaintiff prays the Court to grant judgment as follows:

1. To declare that Section 16-727 B, Arizona Revised Statutes, 1956, and Article 4, Part 2, Section 1 (1) of the Constitution of the State of Arizona—as it provides for (i) the election of two (2) state senators from each county, (ii) the apportionment of one (1) state representative for each county and (iii) the apportionment of additional state representatives to the counties upon the basis of the number of ballots cast in each county at the preceding general election for governor—are unconstitutional.

2. That Article 4, Part 2, Section 1 (1) of the Constitution of the State of Arizona—as it requires state representative districts to have as nearly as may be an equal voting population and to be compact in form—is being applied in an unauthorized manner in deprivation of plaintiff's federal and state constitutional rights.

3. That, commencing prior to and to be effective for the general and primary election of 1966, the congressional and legislative districts within the State of Arizona shall be determined and apportioned, every four (4) years, upon the basis of the voting population of the State of Arizona, as reflected by the number of registered voters within the

State of Arizona at the last preceding general election or at such later date as the Court may deem appropriate.

4. That the congressional and legislative districts within the State of Arizona shall be determined and apportioned so that they are as nearly as may be compact in form and include no noncontiguous territory, and not be the subject of gerrymander.

5. That this Court grant a preliminary injunction, to be made permanent in accordance with law, enjoining defendants, their agents, servants, employees, attorneys, representatives and all other persons participating with them from holding or allowing to be held or performing their lawful and designated duties with respect thereto of any primary, general or special election of the State of Arizona for the offices of United States Representative in Congress or membership in the State of Arizona Legislature in accordance with the existing unconstitutional and unauthorized application of the Constitutional and Statutory law of the State of Arizona which is the subject matter of this action.

6. That the defendant Samual P. Goddard be ordered by this Court in the exercise of his powers and duties under the Constitution and law of the State of Arizona to convene the Legislature of the State of Arizona in extraordinary session for the purpose of enacting such special legislation as may be necessary and appropriate to bring about lawful redistricting and reapportioning of congressional and legislative offices within the State of Arizona.

7. Ordering in the event such special legislation is not enacted within the State of Arizona as is necessary and appropriate to bring about lawful redistricting and reapportioning of the congressional and legislative offices of the State prior to October 1, 1965, that this Court shall then appropriately accomplish such redistricting and reapportioning or in lieu thereof order that all candidates

for such offices shall run at large in the General Election to be conducted on November 8, 1966.

8. Ordering that this Court shall retain jurisdiction of this action for all purposes, including but not limited to (i) considering such sanctions as may be appropriate if the orders of this Court are not complied with, (ii) reviewing and approving the validity of any and all special legislation enacted with respect to redistricting and reapportioning the congressional and legislative districts of the State of Arizona, and (iii) judicially redistricting and reapportioning such districts if not lawfully accomplished.

9. That there be convened a three judge federal district court pursuant to and in compliance with 28 U.S.C. § 2284, to hear this action.

10. Such other and further relief as the Court may deem appropriate.

Dated April 29, 1965.

FELKE, SIMON & HENDERSON

By J. STEPHEN SIMON
J. Stephen Simon
426 N. Marshall Way
Scottsdale, Arizona 85251
Telephone No. 946-3433

Attorneys for Plaintiff

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss.

GARY P. KLAHR, being first duly sworn according to law, and upon his oath, deposes and says:

I am the plaintiff in the above-entitled and numbered action and as such am acquainted with the facts herein; I have read the foregoing complaint and know the contents thereof and to my knowledge the matters stated therein

are true and correct except as to those matters which
alleged upon information and belief and as to those I
lieve them to be correct.

/s/ GARY P. KLAHR
Gary P. Klahr

Subscribed and sworn to before me this 28th day
April, 1965.

/s/ SHIRLEY A. KING
Notary Public

My Commission Expires:
Oct. 6, 1965

Copy of the foregoing mailed
this 29th day of April, 1965, to:

Darrell F. Smith, Attorney General
149 State Capitol
Phoenix, Arizona
Attorney for Defendants

Lewis Roca Scoville Beauchamp & Linton
9th Floor, Title & Trust Bldg.
Phoenix, Arizona 85003

Lawrence Ollason, Esq.
182 N. Court Avenue
Tucson, Arizona 85701

Sheldon Mitchell, Esq.
504 Mayer Central
Phoenix, Arizona 85012

J. STEPHEN SIMON
J. Stephen Simon

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Civ. No. 5112—Phx.

GARY P. KLAHR, *Plaintiff*,

v.

SAMUEL P. GODDARD, Governor of the State of Arizona; WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants*.

Answer to Third Amended Complaint

For their answer to the document which has been filed in this cause under the heading "Second Amended Complaint" but which the Court has corrected and directed be termed the "Third Amended Complaint," the defendants answer as follows:

1. The defendants deny that this plaintiff is capable of suing for the benefit of all of the persons of the voting population of the State of Arizona and deny further that he has standing to complain of any quality, if such there be in any congressional or legislative district of which he himself is a resident; and they further deny that he can adequately represent people of this state or that he has taken any steps fairly to assure that he will so represent them and defendants demand strict proof that the plaintiff has in fact complied with all requirements for the institution of a class action.

2. The allegations of paragraph 2 are admitted as to the defendant Bolin and denied as to the defendant, the Governor of the State of Arizona.

3. The allegations of paragraph 3 are admitted.

4. The defendants deny that Governor Goddard is a resident of Maricopa County and otherwise, the remainder of

the allegations being conclusions of law, neither admit nor deny them.

5. Defendants admit that Secretary of State Bolin is a resident of Maricopa County and otherwise, the remainder of the allegations being conclusions of law, neither admit nor deny them.

6. This paragraph states conclusions of law which are neither admitted nor denied.

7. This paragraph states conclusions of law which are neither admitted nor denied.

8. This paragraph states conclusions of law which are neither admitted nor denied.

9. This paragraph states conclusions of law which are neither admitted nor denied.

10. The allegations of paragraph 10 are admitted.

11. The defendants, not having sufficient information to form a belief, deny the allegations of paragraph 11.

12. The allegations of paragraph 12 are admitted insofar as they purport to apply the figures of paragraph 10 and are otherwise denied.

13. Defendants, not regarding themselves as required to follow the plaintiffs in this argumentative matter, neither admit nor deny the allegations of paragraph 13.

14. Defendants, not regarding themselves as required to follow the plaintiffs in this argumentative matter, neither admit nor deny the allegations of paragraph 14.

15. Not having sufficient information to form a belief, the defendants deny the allegations of paragraph 15 as to the matters of fact, and as to the conclusions of law, they are neither admitted nor denied.

16. The allegations of paragraph 16 are denied.

17. Not having sufficient information to form a belief, the allegations of paragraph 17 are denied except as to they state conclusions of law and these are neither admitted nor denied.

18. The allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 are denied.

20. The allegations of paragraph 20 are denied.

21. Not having sufficient information to form a belief, the allegations of paragraph 21 are denied.

22. The allegations of paragraph 22 are denied.

23. The allegations of paragraph 23 are denied and plaintiffs are put to the proof thereto.

24. The allegations of paragraph 24 are denied.

25. The allegations of paragraph 25 are denied.

26. The defendants further allege that this Court has no jurisdication over the defendant, Samuel P. Goddard, and that the complaint states no cause of action as to him.

27. Defendants allege that this Court has no jurisdiction to require mandatory relief as to the State Legislature or the Governor and that it has no jurisdiction expressly as to the matters covered in paragraph 6 of the prayer for relief.

Wherefore, it is respectfully prayed that the plaintiff take nothing by his complaint, that the complaint be dismissed, but costs be charged against the plaintiff in these proceedings, and that there be judgment for the defendants

in this cause; and for such other relief as may be just and proper.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General

/s/ PHILIP M. HAGGERTY
Philip M. Haggerty
Assistant Attorney General

LEWIS ROCCA SCOVILLE BEAUCHAMP & LINTON

/s/ JOHN P. FRANK
John P. Frank
Special Counsel for the Attorney General

Copy of the foregoing served by mail this 11th day of June, 1965, on:

Felke, Simon & Henderson
426 N. Marshall Way
Scottsdale, Arizona

Sheldon Mitchell, Esq.
504 Mayer Central Building
Phoenix, Arizona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 5112—Phx.

GARY P. KLAHR, *Plaintiff*,

v.

SAMUEL P. GODDARD, Governor of the State of Arizona; WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants*.

Before POPE, Circuit Judge, MATHES and WALSH, District Judges.

Findings, Conclusions and Decree

This is an action brought by Gary P. Klahr, as plaintiff, on behalf of himself and all of the persons of the voting population of the State of Arizona, against the defendants above named. The purpose of the action, as stated in the third amended complaint dated April 29, 1965, is to compel compliance by the officials of the State of Arizona, who are responsible for the supervision and conduct of the elections therein, with the requirements of the Equal Protection Clause of the Federal Constitution with respect to the apportionment of the seats in the two houses of the Arizona Legislature as outlined in the decisions of the Supreme Court of the United States in Reynolds v. Sims, 377 U.S. 533, Lucas v. Colorado General Assembly, 377 U.S. 713, and other similar decisions; and also to compel the redistricting of congressional districts within the State so as to equalize the population of each such district as near as may be done in accordance with the rule laid down by the United States Court in Wesberry v. Sanders, 376 U.S. 1.

The complaint alleges that by virtue of certain provisions of the Arizona Constitution, members of the State Senate are required to be elected upon a purely geographical basis without regard to the wide differences in population. This,

it is claimed, has resulted in an unconstitutional apportionment of the Senate membership.

It is also alleged that the manner prescribed for the apportionment of state representatives within the State results and necessarily always will result in a denial of the equal protection of the law and that in consequence of such malapportionment said provisions respecting the apportionment of members of the House are invalid.

With respect to the congressional districts within the State, it is alleged that the districting for the election of representatives in the United States Congress now provided by § 16-717B of Arizona Revised Statutes 1956, is void and unconstitutional in that although congressional district No. 2, according to the United States census for 1960, or according to the total of registered voters for the several districts for the general election of November 2, 1964, represents approximately one-third of the population, or one-third of the registered voters within the State, yet congressional district No. 1 on either basis represents 51 percent or more of the population or voters of the State while congressional district No. 3 represents 15 percent or less of the population or voters of the State.

Pursuant to the prayer of the complaint a court of three judges was constituted for the purpose of hearing and considering the issues herein. The said court initially ordered that the proceeding be stayed until after the conclusion of the 1965 session of the Legislature. At such session no reapportionment or redistricting was accomplished. The Governor of Arizona called a special session which was convened for the specific purpose of considering and acting upon such matters. The court being advised thereof, ordered that pretrial hearings and trial of the cause be deferred until conclusion of such special session. Sundry proposals to reapportion the Legislature and to redistrict the State for the election of the members of the National House of Representatives were considered by the special

session. It enacted a statute for the purpose of reapportioning the Senate, said enactment being commonly known as Senate Bill 11. The said special session adjourned without any action in respect to redistricting the congressional districts or with respect to reapportioning the House of Representatives. Thereupon this cause proceeded to a pretrial hearing resulting in a pretrial order dated October 13, 1965.

As shown by said pretrial order it was stipulated and agreed that the court must accomplish congressional redistricting of the State of Arizona. Said pretrial order discloses that the following issues with respect to redistricting remain for determination by the court upon trial: whether all three congressional districts should be redefined and realigned as asserted by the plaintiff, or whether the boundaries of said districts be readjusted only to the extent of making the population of districts 1 and 3 substantially equal without disturbing the boundaries of district 2, as asserted by the defendants; whether such congressional redistricting should be based upon the most recent voting registration figures, as asserted by plaintiff, or upon the census population taken from the 1960 census as asserted by the defendants.

Both parties concede that the Arizona constitutional provision for a Senate composed of two members from each of the fourteen counties of the State is invalid; and that if the court determines that Senate Bill 11, as enacted at the special session aforesaid, does not validly apportion the Arizona Senate membership, then reapportionment of the Senate must be accomplished by the court in this action.

With respect to legislative reapportionment, the issues between the parties, as made by said pretrial order, are as follows: whether Senate Bill 11, as enacted, validly apportions the membership of the Arizona Senate as claimed by defendants, or whether the same is invalid as accomplishing an invidious and unconstitutional discrimination

against the majority of the voters of the State and against those subdivisions of the State containing the greater portion of its population. Whether, if a reapportionment of the Senate be ordered by the court the same should be based upon the 1960 census figures, as asserted by the defendants, or whether the reapportionment should be based upon voter registration figures; and whether upon such reapportionment of the Senate, the court may include more than one county in a single district as contended by the plaintiff and denied by the defendants.

Another issue presented is whether or not the Arizona House of Representatives is presently invalidly apportioned as asserted by the plaintiff, or whether the present system is proper and lawful. It is contended that any attempted reapportionment of the House by this court would be premature at the time of trial of this action in view of the constitutional power of the Secretary of State to make reapportionment within the year 1966.

FINDINGS.

1. The court finds that the population in congressional districts 1 and 2 is unequal and disparate and constitutes an unconditional imbalance; and that such imbalance renders the continued following and enforcement of the apportionment requirements of that portion of § 16-727 which relates to congressional districts 1 and 3 void, unconstitutional and prohibited within the meaning of the decision of the Supreme Court of the United States in Wesberry v. Sanders, supra.

The court finds that congressional district No. 2, as now established, is valid and properly apportioned and that there is no occasion for this court to undertake to alter the boundaries thereof. The population of the state of Arizona, as disclosed by the 1960 census, was 1,302,161. The same census discloses that the then population of congressional district No. 2 was 440,415, or 34 percent of the population

of the State, that is to say, substantially one-third of such population, and the same represents, as to congressional district No. 2, an appropriate apportionment of the State's population.

2. The court finds that because congressional districts No. 1 and No. 3, as heretofore constituted, are adjacent to each other, it is feasible to adjust and correct the malapportionment between such two districts by moving a portion of Maricopa County, which is district No. 1, into and making the same a part of district No. 3. According to the 1960 census, district No. 1 then had a population of 663,510, while congressional district No. 3 had a population of 198,236, or 51 percent and 15 percent respectively of the state population. The court finds that an appropriate transfer of populated areas from congressional district No. 1 to congressional district No. 3, may be made by drawing a new line through Maricopa County in the manner which was proposed by a conference committee of the two Houses during a special session of the Legislature, aforesaid, which line was as follows: "Beginning at a point where the Agua Fria River intersects the Maricopa-Yavapai county boundary line; thence south along the Agua Fria River to its intersection with Olive Avenue; thence east along Olive Avenue (Dunlap Avenue) to its intersection with Nineteenth Avenue; thence south along Nineteenth Avenue and its alignment to its intersection with the Maricopa-Pinal county boundary line." All portions of Maricopa County lying west of the line so drawn are to be transferred to and become a part of congressional district No. 3.

The change thus made in respect to congressional districts 1 and 3 will accomplish a reapportionment of congressional districts (using 1960 census figures) as follows: district No. 1, 461,495, district No. 2, 440,415, district No. 3, 400,251.

3. The court finds that in making the several reapportionments herein provided for, it can do so most accurately

by basing its findings upon the figures appearing in the 1960 census. For the purpose of supporting his contention that the reapportionment should be based upon 1964 populations, plaintiff has through his witnesses undertaken to project an estimated 1964 population by calculating the ratio of registered voters to population in various counties in census years and then applying that ratio to the registration of voters for the 1964 elections. The court finds that the calculations thus produced by the plaintiff have not been established with sufficient certainty and accuracy to warrant their use by the court to determine an appropriate reapportionment of congressional districts and state legislative districts in this decree. Recent census figures secured by actual count in the City of Phoenix, in Pinal County and in Yuma County, depart so far from plaintiff's estimates and calculations of 1964 population in those areas that the court feels justified in rejecting the calculated 1964 population figures as a basis for reapportionment in this case.

4. The court finds that the said Senate Bill 11, as enacted at the special session of the Arizona legislature and signed by tht Governor, accomplishes an unconstitutional and invidious discrimination in the apportionment of the seats in the State Senate. Said Senate Bill 11 bears evidence of having been thrown together as a result of considerations wholly apart from those laid down as compulsory by the decisions of the Supreme Court. As disclosed by plaintiff's Exhibit No. 14, the 31 seats in the Senate provided for by said bill are apportioned by assigning to Maricopa County 13, to Pima County 5, to Pinal County 2, and one each to all of the other eleven counties regardless of their wide disparity in population. An ideal population per senate member for a senate of 31 members, as contemplated by Senate Bill 11, would be 42,005 persons. As a result of the apportionment provided for by Senate Bill 11 certain of said counties would depart from the ideal size by excessive percentages. Thus Cochise County, with 1960 popu-

lation of 55,039 exceeds the ideal population for one senator by 13,034, or in excess of 31.03 percent. That is to be compared with Mohave County with a 1960 population of 7,736, which is 34,269 less than the ideal population, or a departure of 81.58 percent. Such is a voter weight ratio of over seven to one. Similar discrepancies exist throughout Senate Bill 11 which the court hereby finds accomplishes an invidious discrimination aganst the more populous counties and the voters thereof.

5. The court finds that any apportionment of membership of the House of Representatives accomplished pursuant to Art. 4, Pt. 2 § 1 of the Arizona Constitution, through the action of the Secretary of State, will necessarily result in an invidious and unconstitutional discrimination against the larger centers of population of the State and the voters thereof. Under said constitutional provision the Secretary of State is required to begin his apportionment by awarding to each county one representative. Plaintiff's Exhibit 15 discloses that Apache County, under the constitutional system provided, would be granted one representative to the 80 member House, whereas Yavapai County would be granted three representatives. On the basis of the 1960 population Apache County, with a population of 30,433 would have but one representative, whereas Yavapai County, with a population of 28,912 would have three members. This would create a voter weight ratio of nearly four to one. Apportionment under the State constitution will result in deviations from the ideal population per representative ranging from a high of plus 87 percent to a low of minus 52.47 percent. The court finds therefore that reapportionment of the said House is necessary.

6. The court finds that an appropriate and validily apportioned Legislature of the State of Arizona elected in the year 1966 would consist of 30 senators and 60 representatives elected from eight legislative districts within the State. The apportionment of said members of the House and of the Senate hereinafter set forth and described in

the table following will meet as near as may be the requirements of the Fourteenth Amendment to the Constitution of the United States as interpreted in the decisions aforesaid and the same should be established and put into effect as a temporary and provisional reapportionment of the Legislature of the State of Arizona.

This finding is based upon the United States census figures for the year 1960, which, as above stated, the court finds to be the most reliable and dependable basis for reapportionment in accordance with this decree. Using those figures an ideal apportionment for a Senate of 30 members would provide a population of 43,405 for each member and for a House of Representatives of 60 members the ideal population for each member would be 21,703.

The following tabulation indicates the appropriate areas of legislative districts which the court finds to be necessary to accomplish the required reapportionment, the number of representatives or senators to be elected from each district, the population of such district, and the deviation percentages from the ideals above referred to, which will result from such reapportionment. The tabulation aforesaid is as follows:

HOUSE—Ideal Population Per House Member, 21,703

District Number	Counties	Number of Representatives	Population	Deviation Percentage From Ideal
1	Mohave-Yavapai	2	36,648	+15.569
2	Cochise-Graham-Santa Cruz	4	79,892	+ 7.971
3	Navajo-Apache-Greenlee	4	79,941	+ 7.915
4	Coconino	2	41,857	+ 3.570
5	Pinal-Gila	4	88,418	— 1.852
6	Yuma	2	46,235	— 6.519
7	Pima	12	265,660	— 2.004
8	Maricopa	30	663,510	— 1.907

SENATE—Ideal Population Per Senate Member, 43,405

District Number	Counties	Number of Senators	Population	Deviation Percentage From Ideal
1	Mohave-Yavapai	1	36,648	+15.567
2	Cochise-Graham-Santa Cruz	2	79,892	+ 7.969
3	Navajo-Apache-Greenlee	2	79,941	+ 7.913
4	Coconino	1	41,857	+ 3.566
5	Pinal-Gila	2	88,418	— 1.852
6	Yuma	1	46,235	— 6.519
7	Pima	6	265,660	— 2.006
8	Maricopa	15	663,510	— 1.909

(In the foregoing table plus percentages indicate what may be termed "over representation" of the district involved, while the minus figures represent "under representation.")

The court concludes:

1. That the aforesaid State constitutional provision above referred to and included in Article 4 Pt. 2 § 1, to the extent that it is inconsistent with the provisions of this decree, and in the respects hereinbefore set forth, is void and of no effect, in consequence of its providing for a system of apportionment of the House of Representatives of the Arizona Legislature in violation of the Fourteenth Amendment to the Constitution of the United States as construed and interpreted in the decisions of the Supreme Court above referred to.

2. That the legislative enactment of the special session of the Arizona Legislature above referred to and commonly known as Senate Bill 11, as enacted and signed by the Governor, is void and of no effect in consequence of its providing for a system of apportionment of the members of the State Senate which is in violation of the said Fourteenth Amendment as construed and interpreted in the decisions aforesaid.

3. That those portions of § 16-727 of the Arizona Revised Laws 1956 which define the boundaries of congressional district No. 1 and of congressional district No. 3, are to the extent above referred to, void and unconstitutional for the reasons set forth in the decision of the United States Supreme Court in Wesberry v. Sanders, supra.

4. The constitutional and statutory provisions of the State of Arizona heretofore and now in effect with respect to the membership and apportionment of membership of the State Legislature, including said Senate Bill 11, are so constituted as to bring about an invidious and unconstitutional discrimination against the majority of the voters of the State and against those subdivisions of the State containing a greater portion of the population thereof. Such discrimination prevails both in respect to the Senate and in respect to the House of Representatives.

5. The said State Legislature has had ample opportunity, both at its regular and special sessions, to provide a valid reapportionment of its membership, and a valid provision for congressional redistricting of the State. It has failed to accomplish the required reapportionment and redistricting notwithstanding previous suggestions in the orders of this court that the primary duty in this respect is upon the legislature. The required procedures in preparation for the 1966 primary and general elections must be taken shortly and without further delay and since there is no prospect of legislative action in respect to these matters it is the duty of the court now, as agreed by the parties, to order into effect a redistricting of congressional districts and a reapportionment of both Houses of the Arizona Legislature for the 1966 primary and general elections and for such further elections as may follow until such time as the Legislature itself may adopt different and valid plans for distributing and reapportionment.

* * * * * * * * * *

establishment of subdistricts of legislative districts 7 and 8, all to the end that in those larger populated districts the voters not be confronted with an excessive list of candidates at the primary or general elections for members of the legislature.

DECREE

By reason of the foregoing findings and conclusions,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

That Art. 4, pt. 2 § 1, of the Constitution of the State of Arizona, and the Act of the special session of the Legislature, above referred to, and commonly described as Senate Bill 11, as enacted and signed by the Governor, and § 16-727 of the Arizona Revised Statutes of 1956, to the extent that the same are in conflict or not in conformity with the reapportionment plan and the redistricting plan set forth herein, are void and unconstitutional and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or void under Article 1 § 2 of said Constitution; and the defendants herein are perpetually enjoined from in any manner enforcing or recognizing the same and from conforming thereto and no members of Congress and no Legislature of the State of Arizona shall hereafter be elected or constituted as provided in the said void portions of said sections.

That there shall be and there is hereby established a system of congressional districts for the State of Arizona as follows:

Congressional district No. 1 shall comprise that part of the County of Maricopa described as follows: Beginning at a point where the Agua Fria River intersects the Maricopa-Yavapai county boundary line; thence South along the Agua Fria River to its intersection with Olive Avenue; thence east along Olive Avenue (Dunlap Avenue) to its intersection with Nineteenth Avenue; thence south along

Nineteenth Avenue and its alignment to its intersection with the Maricopa-Pinal county boundary line; thence follow Maricopa county boundary line east, north, east, northwesterly, southwesterly, northwesterly, and west to its intersection with the Agua Fria River, the point of beginning.

Congressional district No. 2 shall comprise the same counties presently provided for in § 16-727 of the Arizona Revised Statutes of 1956.

Congressional district No. 3 shall comprise the counties of Apache, Coconino, Gila, Graham, Greenlee, Mohave, Navajo, Yavapai, and that portion of Maricopa County not included within congressional district No. 1, as above described.

That the defendants are enjoined from proclaiming, certifying or conducting any election of the members of the State Legislature in any manner other than as set forth in the findings or conclusions herein, and in particular, all election proclamations of the Governor, as provided in § 16-705 of said Arizona Revised Statutes and by the Secretary of State, as provided in § 16-501 of said Arizona Revised Statutes, shall in respect to the offices for senator and representative of said State Legislature state and specify the offices and legislative districts herein set forth to be filled, and the defendants are enjoined from making any proclamation inconsistent with this direction.

Nomination petitions and nomination papers for offices and positions herein referred to, regardless of whether the candidate in question is to be voted for in one county or in more than one county, shall be filed with the Secretary of State in the manner provided by § 16-301 of said Arizona Revised Statutes, and not otherwise.

The returns after canvass by the board of supervisors of votes at the elections for said offices shall be certified to the Secretary of State as provided in §§ 16-571 and 16-984

of said Arizona Revised Statutes and the same shall be canvassed by the Secretary of State in the manner provided by §§ 16-571 and 16-991 of said Arizona Revised Statutes, and certificates of nomination and election shall be issued by the Secretary of State as provided in §§ 16-571 and 16-992 of said Arizona Revised Statutes, regardless of whether the person so elected is voted for in one county or in more than one county.

It Is Further Ordered that Maricopa County and Pima County shall be divided into sub-districts. Fifteen such sub-districts shall be established in Maricopa County to be designated 8-A to 8-O, inclusive, the same to be as nearly equal in population as possible, and composed of contiguous areas.

Each of the parties hereto is directed to file with the Clerk of this court, within thirty days after the filing of this decree, his or their proposals for a plan for so subdividing said County. In designing such plans, the parties may base the same upon the 1964 voter registration figures, or upon such other statistics as they may find available.

Six sub-districts shall be established in Pima County, in like manner, to be designated as 7-A to 7-F, inclusive. Plans or proposals for such Pima County subdivisions shall be filed by the parties in the same manner as herein provided in respect to Maricopa County.

After examination of the said plans of the parties the court will supplement and modify this decree so as to incorporate a definition of the boundaries of such sub-districts.

One Senator and two Representatives shall be elected from each of said subdistricts. In all other cases, the Senators and Representatives from the legislative districts herein prescribed shall be elected at large from their respective districts.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the foregoing reapportionment of both Houses of the Arizona Legislature, together with the directions and requirements relating thereto, is ordered into effect for the purposes hereinbefore stated. The defendants herein, and all those acting by and under their authority and pursuant to the proclamations and directions by them made, are hereby ordered and directed to accept filings and conduct elections in accordance with the provisions of this decree, and they are hereby enjoined and restrained from accepting filings or conducting elections in any manner inconsistent with the provisions of this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this court does and shall retain jurisdiction of this cause until after said Legislature to be elected, as aforesaid, in 1966, shall have taken office and shall have concluded its first annual session. Such jurisdiction is retained for the purpose of passing upon the aforesaid proposals for sub-districts and for the purpose of adjudging and passing upon the validity of any plan of reapportionment or of any plan for redistricting enacted by the said succeeding legislative session and to compel compliance with this decree and the constitutional provisions herein referred to.

Dated: This 2 day of February, 1966.

WALTER L. POPE
United States Circuit Judge

JAMES A. WALSH
United States District Judge

United States District Judge

IN THE UNITED STATESS DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 5112 Phoenix

GARY P. KLAHR, *Plaintiff*,

v.

SAMUEL P. GODDARD, Governor of the State of Arizona; WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants.*

Opinion

Before: POPE, Circuit Judge, MATHES and WALSH, District Judges.

POPE, Circuit Judge.

This opinion is designed to accompany the court's decree and is for the purpose of explaining the views which have led to its drafting in final form. We have accepted the defendants' contentions concerning the appropriate mode of adjusting the lines of these congressional districts so that they will be substantially equal in population. Various suggestions for the drawing of other lines to move portions of district No. 1 into district No. 3 were made at the hearings, but we choose to adopt the defendants' suggestions since the line of demarcation they proposed had been accepted as a compromise by the conference committee of the two Houses of the Arizona Legislature at the special session. The proposal was accepted by vote of the Senate. In the House it received 38 favorable votes as against 31 negative votes, 11 members of the House being recorded as not voting. We assume the abstentions were due to the fact that the legislative session was near its end and a number of members were absent. Although under the rules of the House the 38 majority was insufficient to pass the measure the vote shows a favorable acceptance by most members of both houses and for this reason we as a court

considered it appropriate to adopt this plan for redistricting. Since district No. 2 is at present substantially in compliance with the constitutional requirement, we find no reason for disturbing its boundaries.

Our findings adequately show, we think, the reason for rejecting Senate Bill 11 as an appropriate method for apportioning the Senate seats. We know of nothing in any of the Supreme Court decisions which would warrant this statute's extensive deviations from the "one man one vote" rule implicit in such decisions. An analysis of the figures furnished on plaintiff's Exhibit 14 makes it obvious Senate Bill 11 is shot through with invidious discrimination.

In an effort to sustain and justify the provisions of Senate Bill 11, the defendants have relied on arguments which have been expressly repudiated by the Supreme Court. One of the main contentions of the defendants is that the apportionment plan of Senate Bill 11 is appropriate and proper because it serves to give recognition to the varying identifiable needs and regional, social and economic interests of the geographic areas involved. This is the argument which may be found in the dissenting opinion in Lucas v. Colorado General Assembly, 377 U.S. at pp. 713, 750, 751. There Mr. Justice Stewart said: "The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests." He referred to "the important goal of ensuring a fair, effective and balanced representation of the regional, social and economic interests within a State." The opinion of the Court expressly rejected this argument. In the Court's opinion at page 738 the Court said: "But appellees' argument, accepted by the court below, that the apportionment of the Colorado Senate, under Amendment No. 7, is rational because it takes into account a variety of geographical, historical, topographic and economic considerations fails to provide an adequate justification for the substantial disparities from population-based representa-

tion in the allocation of Senate seats to the disfavored populous areas." And see the discussion in the footnote where the Court expressly rejected the lower court's attempt to justify varying population bases in order to accord recognition to "the state's heterogeneous characteristics." The same rejection of that argument is made in Reynolds v. Sims, 377 U.S. 579, 580, where the Court said: "But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes."

Another contention made by the defendants is that to combine some of these counties to create one legislative district would produce a district whose size and area is so great as to make campaigning therein enormously difficult. This is the argument which was rejected in Reynolds v. Sims, supra, where the Court said at p. 580, that such an argument in these days of modern improvements in transportation and communication sounds rather hollow and is "unconvincing". At p. 581, the Court said: "Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body." The Court disapproved any system whereby "population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body." The decisions of the Supreme Court, in line with Reynolds v. Sims, make it plain that where population is sparse, areas to be represented must necessarily be large. To hold otherwise is to go against the Supreme Court's doctrine in this field.

The findings indicate our reasons for requiring apportionment to be made at this time on the basis of the 1960 census. Plaintiff made a valiant effort to demonstrate what was the 1964 population of these various areas. If the 1964 population could be demonstrated with certainty,

much could be said in favor of apportionment upon such a basis. It was sufficiently demonstrated that Arizona has a most rapidly increasing population and that increases are not uniform throughout the State. Witnesses produced by the plaintiff undertook to determine the approximate population of various counties by demonstrating past ratios between registered voters and population in those counties. Then assuming a like ratio would exist in 1964, these witnesses calculated the 1964 population by applying a similar ratio to the number of registered voters in these areas as established for the 1964 election. We know judicially that since the trial a special census conducted by the United States Bureau of the Census in Pinal County has shown a population in that county substantially less than that testified to by the plaintiff's witnesses. On the other hand, another special census similarly made in Yuma County has shown a substantially larger population in that county than that arrived at by plaintiff's witnesses. At the trial the defendants established the fact that special census figures for the cities of Phoenix and Tucson indicated a materially smaller population for those areas than those calculated by plaintiff's witnesses. For these reasons we are not satisfied that the estimates or calculations of 1964 population produced at the trial are sufficiently reliable or dependable to permit the basing of our decreed reapportionment on them.

Our findings with respect to the invalidity of the constitutional system of apportionment of the Arizona House of Representatives are based largely upon the showing made by the plaintiff in his Exhibit 15, and we are convinced that the Secretary of State cannot by following the present State constitutional provision turn up with a properly apportioned House. The Secretary of State necessarily starts with a disproportion through the requirement that each county start with one representative. The startling and striking disproportion with respect to the representation of Apache County and Yavapai County in the House of Rep-

resentatives set up under the provisions of the Constitution mentioned, may be explained by the fact that Apache County, with a large proportion of Indian population, would appear to cast a light vote as compared with the population of Yavapai County with a comparatively heavy vote. The section of the Constitution here involved provides for extra representation on the basis of ballots cast in the election for Governor. This tends to bring about an unacceptable apportionment for the reasons discussed in WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 924.

In arriving at the number of Senators and Representatives we considered the possibility of a reapportionment of a House of 80 members, its present size. Such an effort, as any one who tries it will discover, cannot produce a result consistent with any degree of preservation of county lines. Provision for a House of 60 members is consistent with the constitutional provision for a House "not to exceed 80 members." The arrangement for identical senatorial and representative districts will provide a desirable simplicity.

The reason for requiring nomination papers and election returns to be filed with the Secretary of State, and for requiring canvass of returns to be made in that office and certificate of election to be issued by the Secretary, is that we have here a substantial number of districts composed of more than one county. For the purpose of avoiding confusion in the operation of the election machinery for the reapportioned legislature we have required uniformity in this respect regardless of the number of counties involved.

We have provided for the creation of subdistricts in the two most populous counties as a desirable means of procuring intelligent voting in those counties. Thus if 30 representatives are to be elected from Maricopa County and two principal parties are to nominate candidates for those offices, it is plain that each party would endeavor to nominate at least 30 nominees, and it is conceivable that there

would be at least two candidates for each nomination which might well result in 60 candidates in each party for nomination in the primary election. This would mean that the voters of the county would be confronted with some 120 aspirants for nomination and at the general election with 60 candidates, such a system would not tend to intelligent voting. The Legislature at its special session, in enacting Senate Bill 11, wisely, we think, made provision for separate senatorial districts in Maricopa and Pima counties, such districts to be prescribed by the board of supervisors. We note that the Bill prescribed no standards to be followed by the board of supervisors such as those contained in Art. 4, pt. 2 § 1 of the State Constitution. We have also rejected suggestions that we should limit our decree to a requirement of an election of all members of the Legislature at large within the entire State. We deem it our duty to provide as workable a system as may be possible. Because we cannot find in the record any readily understandable guide to permit us to define appropriate subdivisions of these two large counties, we have called on the parties to supply us with data and plans for this purpose.

We think that this does not impose an impossible task upon the parties. For the purpose of defining these subdistricts within these two counties it is plain that there are no available census figures. But because it cannot be assumed that within a single county there are widely variant ratios between voter registration and population, it is clear that this sub-districting can be done on the basis of the 1964 voter registration figures. See Buckley v. Hoff., D.Vt., 243 F. Supp. 873, 875-876. Plaintiff's Exhibit 11a discloses that this subdistricting is possible. That Exhibit uses estimated population figures projected, through application of a stated ratio to registered votes, which amounts to about the same thing as here suggested. (Instead of assigning 15 senators to Maricopa it assigns 15⅔.) We would hope that the parties might find it possible to agree upon a plan for defining these subdistricts.

The defendants' motion to dismiss as to the defendant Governor is denied. We deem it essential that he should be required to list in his proclamations under § 16-705 of the Arizona Revised Statutes, the several offices set forth in our decree among the "offices to be filled" at the 1966 elections.

WALTER L. POPE
United States Circuit Judge

JAMES A. WALSH
United States District Judge

.....
United States District Judge

Feb. 2, 1966

WALSH, District Judge (Concurring Specially):

I am unable to understand the statement on page 4 of the opinion of our dissenting brother to the effect that the majority countenances a known deviation percentage *from ideal* as between House District No. 1 and House District No. 6 of more than 22 per cent. As is very clearly shown by the majority's Finding of Fact No. 6, the deviation percentage-wise *from ideal* for House District No. 1 is +15.569 per cent; and the deviation percentage-wise *from ideal* for House District No. 6 is —6.519. It appears that our brother has calculated the percentage difference between *the populations* of the House Districts, rather than the percentage which the decided cases have held to be important, that is, the deviation between the actual population in a legislative district and the population which would be ideal for such district.

As to our brother's further statement that the majority decision permits on its face a deviation of more than 31 per cent, I must confess that after restudying the major-

ity's Findings, Conclusions and Decree and the majority's Opinion, I am unable to find any basis for this statement in the dissent.

DATED: Feb. 2, 1966

JAMES A. WALSH
United States District Judge

Concurring and Dissenting Opinion

MATHES, Senior District Judge:

For the reasons stated in the majority opinion, I concur in the Court's denial of defendants' motion to dismiss the action as to the Governor. But I feel compelled, with all due deference, to dissent from the judgment insofar as it devises a Federal-made congressional and legislative reapportionment scheme for the State.

My views as to the propriety and competency of Federal courts affirmatively seeking to impose a reapportionment plan of their own making upon any State are fully stated in *Hearne* v. *Smylie,* 225 F.Supp. 645 (D. Idaho 1964). These views were promptly rejected by the Supreme Court of the United States, [378 U.S. 563 (1964); see: *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Davis* v. *Mann,* 377 U.S. 678 (1964); *Lucas* v. *Forty-Fourth Gen. Assembly of Colorado,* 377 U.S. 713 (1964).]

I am duty bound then, by the doctrine of *stare decisis,* to follow the decisions of the Supreme Court, and to heed the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as interpreted by the most recent decisions of the Supreme Court. So I must assume, although I am unable to comprehend how, an "unconstitutional" State legislature can possess the power to enact a constitutional scheme of reapportionment; failing which a Federal court has the power

to "enact" a reapportionment plan of its own, and by some legal legerdemain convert that plan into positive State law.

Amidst all the precedent-shattering language of *Reynolds* v. *Sims, supra,* is the admonition that, in imposing a scheme of reapportionment upon any State, a Federal court should always "accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." [377 U.S. at 584.]

On the same day the Supreme Court declared: "It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house." [*Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 673 (1964).]

Applying the slogan-rule of "one person, one vote", it must be conceded that, by reason of the disparity of population among the fourteen counties of Arizona, Art. 4, Pt. 2, #1, of the Arizona Constitution, to the extent that it provides for the election of two senators from each county, violates the Equal Protection Clause of the Fourteenth Amendment, as now interpreted by the Supreme Court. [*Reynolds* v. *Sims, supra,* 377 U.S. 533.]

Apparently acting upon that assumption, the present Arizona Legislature has recently enacted Senate Bill 11, which provides for at least one senator from each of the fourteen counties, with five allotted to Pima County [Tucson] and thirteen to Maricopa County [Phoenix].

Considered, as it must be, along with the apportionment of the House of Representatives [see *Maryland Committee for Fair Representation* v. *Tawes, supra,* 377 U.S. at 673], the scheme provided for the Arizona Senate in Senate Bill 11 does not in my opinion dilute "the equal population principle . . . in any significant way" [*Reynolds* v. *Sims, supra,* 377 U.S. at 578]; and is therefore valid. [*Cf. Dorsey* v. *Fortson,* 379 U.S. 433 (1965).]

Applying the "equal population principle", it must be conceded that, by reason of the disparity of population among the fourteen counties of Arizona, Art. 4, Pt. 2, #1, of the Arizona Constitution, to the extent that it prohibits the election of more than eighty members of the House of Representatives for the entire State, while requiring a minimum of one representative for each county, violates the Equal Protection Clause of the Fourteenth Amendment. However, there has been no showing that the remaining provisions of Art. 4, Pt. 2, #1, pertaining to the House of Representatives, if applied in conjunction with Senate Bill 11, would dilute the equal population principle in any significant way.

While I hold in high regard the views of my distinguished colleagues, I am unable to subscribe to their conclusion that a Federal-Court-made scheme of reapportionment is valid (1) which is based upon population figures a half-decade old; (2) which admittedly allows a known "Deviation Percentage From Ideal", as between District 1 comprising Mohave-Yavapai counties and District 6 comprising Yuma County, of more than 22%; and (3) which permits on its face a deviation of more than 31% (and, were present day population figures known, might well permit a much greater "Deviation Percentage From Ideal").

If reapportionment must be based upon a mathematical standard, there appears no rational basis for departing 30% and more from the exactness of such a standard. The Supreme Court admonished in *Reynolds* v. *Sims:* "Citizens, not history or economic interests, cast votes". [377 U.S. at 580.] It must be equally correct to say that "citizens, not counties, cast votes". By permitting county lines to govern their plan for redistricting the State, my colleagues have permitted the equal population principle to be unnecessarily diluted to a substantial degree; and it appears to me that no one can say with assurance whether that is not a greater dilution than the plan devised by the Legislature in Senate Bill 11, when considered along with the reapportionment of the House.

Rather than seek to impose a Federal-Court-made scheme of reapportionment upon the State, I would favor enjoining all save elections at large for the 31 Senate seats established by Senate Bill 11, until both the Senate and the House of Representatives of the State shall have been apportioned by the Legislature in conformity with the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted in the most recent decisions of the Supreme Court of the United States. [See: *Scott* v. *Germano,* 381 U.S. 407, 409-410 (1965).]

I would also declare § 16-727 of the Arizona Revised Statutes, establishing the three Congressional Districts of Arizona, to be invalid under *Wesbury* v. *Sanders,* 376 U.S. 1 (1964), and would likewise enjoin further elections, otherwise than at large, until a constitutional congressional redistricting shall have been made.

/s/ WM. C. MATHES
Senior United States District Judge

January 31, 1966.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 5112 Phoenix

GARY P. KLAHR, *Plaintiff,*

v.

SAMUEL P. GODDARD, Governor of the State of Arizona; and WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants.*

First Supplemental Decree

The Court having entered its decree herein on February 2, 1966, wherein it provided, inter alia, that Maricopa County and Pima County would be divided into temporary and provisional legislative subdistricts, the same to be as

nearly equal in population as possible and composed of contiguous areas, and that the parties should file with the Clerk of this Court their proposals for so subdividing said Counties, and the parties having now stipulated a proposed plan for subdividing Maricopa County into legislative subdistricts, and each of the parties having separately submitted to the Court a proposed plan for subdividing Pima County into legislative subdistricts, and the Court having considered such plans and being fully advised in the premises, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

That Maricopa County shall be divided into fifteen legislative subdistricts, designated 8-A to 8-O, inclusive, each legislative subdistrict to be composed of the Maricopa County election precincts hereinafter specified:

Maricopa County Election Precincts	Legislative Subdistrict No.
Barr, Chandler 1, Chandler 2, Chandler 3, Chandler 4, Guadalupe, Gilbert, Higley, Hope, Kyrene, Queen Creek, Roosevelt, Sierra Vista, Tempe 5, Tempe 7, Tempe 8, Tempe 9, Tempe 10, Tempe 11, Tempe 12, Thunderbird, Valley View	8-A
Buckhorn, Desert Baths, Lehi, Mesa 1, Mesa 2, Mesa 3, Mesa 4, Mesa 5, Mesa 6, Mesa 7, Mesa 8, Mesa 9, Mesa 10, Mesa 11, Mesa 12, Mesa 13, Mesa 14, Mesa 15, Mesa 16, Mesa 17	8-B
Apache, Arcadia, Cave Creek, Century, Fish Creek, Honda, Hope, Ingelside, Kiva, Maricopa, Mohave, Navajo, Paiute, Paradise, Picadilly, Pima, St. Barnabas, Scottsdale East, Scottsdale High, Scottsdale West	8-C

Barnes, Cochise, Coronado, Gardens, Geronimo, Hohokam, Oak Park, St. Daniel, Supai, Tempe 1, Tempe 2, Tempe 3, Tempe 4, Tempe 6, Tempe 13, Tempe 14, Tempe 15, Tonolea, Tonto, Yavapai	8-D
Biltmore, Brentwood, Camelback High, Cavalier, Cudia, Desert Park, Glenrosa, Harvard, Kachina, Lafayette, Monte Vista, Olivette, Squaw Peak, Suncrest, Ventura, Yale, Zuni	8-E
Balsz, Bellview, Creighton, Crockett, Del Ray, Edgemont, Edison, Garfield, Griffith, Holly, Hunt, King, Machan, Oakleaf, Palm, Papago, Perry Park, St. Agnes, Whittier, Windsor	8-F
Bethune, Broadway, Carver, Court, Dunbar, Grant, Hialeah, Highway, Julian, Lincoln, Longfellow, Lowell, Monroe, Okemah, Parkview, Rio Vista, Skiff, Sky Harbor, South Mountain High, Stevenson, Sunland, Wilson	8-G
Alvarado, Brild, Capitol, Carnation, Clarendon, College, Emerson, Encanto, Flower, Franklin, Kenilworth, Los Olivos, Lynwood, McKinley, Monterey, North High, Wadecroft, St. Gregory, University, Vandle Park, Westview, Willetta, Wilshire, Y.M.C.A.	8-H
Avalon, Bethany, Central High, Citrus, Claremont, Country Club, Fairmount, Lamar, Loma, Linda, Longview, Madison 1, Madison 2, Madison Park, Manor, Osborn, Plaza, Rancho, Rose Lane, St. Francis, St. Thomas	8-I

Desert View, Dreamy Draw, El Domingo, Glenn, Grandview, Hayward, Hazelwood, Marlette, McLellan, Mount Calvary, Nile, Orangewood, Royal Palm, San Juan, Simis, Solano, Sunny High, Sunnyslope, Wagon Wheel	8-J
Adobe, Cactus, Camp, Bello, Cholla, Deer Valley, Desert Hills, Greenway, Hatcher, LaJolla, Marinette, Mountain View, New River, Peoria, Sahuaro, St. Christopher, Shaw Butte, Sun City, Trinity, Youngtown, Yucca	8-K
Alta Vista, Ambassador, Barcelona, Catalina, Glendale 5, Lake, Manzanita, Maryland, Monte Bello, Myrtle, Northview, Ocotillo, Simpson, Sungold, Washington, Westwood	8-L
Alhambra, Andalucia, Crittendon, Downs, Glendale 4, Glendale 9, Granada, Long, Lynhaven, Madrid, Maryvale, Messiah, Mulberry, St. Vincent, Sevilla, Valencia, West High, Whitton	8-M
Avondale, Brown, Butler, Cartwright, Cashion, Christy, Coe, Durango, Gila Crossing, Goodyear, Grand Avenue, Hayden High, Isaac, Jackson, Latham, Laveen, Murphy, Riverside, Sullivan, Sutton, Tolleson	8-N
Aguila, Arlington, Buckeye 1, Buckeye 2, Dysart, Gila Bend, Glendale 1, Glendale 2, Glendale 3, Glendale 6, Glendale 7, Glendale 8, Harquahala, Holiday Gardens, Holiday Park, Lexington, Liberty, Litchfield, Maryvale High, Mobile, Morristown, Orme, Palo Verde, Sentinel, Starlight, Sunset, Tonopah, Wickenburg 1, Wickenburg 2	8-O

It Is Further Ordered, Adjudged and Decreed that Pima County shall be divicided into six legislative subdistricts, designated 7-A to 7-F, inclusive, each legislative subdistrict to be composed of the Pima County election precincts hereinafter specifidied:

Pima County Election Precincts Nos.	Legislative Subdistrict No.
1, 2, 3, 5, 13, 27, 29, 34, 35,5, 36, 37, 38, 43, 55, 57, 59, 60, 61, 63, 65, 1304, 107, 108, 109, 112, 128, 130, 131, 135	7-A
4, 6, 7, 8, 9, 10, 11, 12, 14,4, 15, 16, 17, 19, 20, 21, 22, 41, 46, 58, 62,2, 64, 79, 105, 110, 111, 139	7-B
30, 33, 39, 40, 44, 67, 68, 69,9, 70, 75, 76, 97, 99, 100, 101, 102, 103, 1118, 119, 122, 129, 132, 134, 138	7-C
18, 23, 28, 31, 45, 47, 48, 50,0, 66, 81, 82, 84, 85, 86, 87, 88, 106, 125, 1136, 137	7-D
24, 25, 26, 32, 49, 51, 53, 54,4, 71, 80, 89, 90, 95, 96, 98, 113, 114, 123, 1124, 126	7-E
42, 52, 56, 72, 73, 74, 77, 78,8, 83, 91, 92, 93, 94, 115, 116, 117, 120, 12121, 127, 133, 140, 141, 142	7-F

It Is Further Ordered, Adjudged and Decreed that this Court continues to retainin jurisdiction of this cause as in the Decree of Februaiary 2, 1966, provided.

Dated this 14th day of Mafarch, 1966.

/s/ Walter L. Pope
United States Circuit Judge

/s/ James A. Walsh
United States District Judge

/s/ .....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 5112 Phoenix

GARY P. KLAHR, *Plaintiff*,

v.

SAMUEL P. GODDARD, Governor of the State of Arizona; et al., *Defendants*.

Second Supplemental Decree

The Court having entered its decree herein on February 2, 1966, and its First Supplemental Decree herein on March 14, 1966, now finds it appropriate, being fully advised in the premises and good cause appearing therefore, to enter this Second Supplemental Decree for the purpose of clarifying particular terms contained in such original decree and in order to integrate and co-ordinate the terms and provisions of both such earlier decrees with certain Arizona statutes pertaining to elections.

IT IS ORDERED, ADJUDGED, AND DECREED that the words "annual session" and "succeeding legislative session" used in the final paragraph of the decree in this case are deemed to mean the First Regular Session of the Twenty-eighth Legislature of the State of Arizona which convenes on the second Monday in January, 1967.

IT IS ORDERED, ADJUDGED, AND DECREED FURTHER that unless and until A.R.S., 1956, § 41-1111 shall be amended or superseded, the verified statement of contest provided for in such section shall be filed with the clerk of the superior court of the county in which the contestee resides or with the clerk of the superior court of any other county within the legislative district.

IT IS ORDERED, ADJUDGED, AND DECREED FURTHER that unless and until A.R.S., 1956, § 41-1201 shall be amended

or superseded, the proclamation provided for in such section shall be addressed to the board or boards of supervisors, as the case may be, of the county or counties within which the vacancy exists.

It Is Ordered, Adjudged, and Decreed Further that unless and until A.R.S., 1956, § 41-1203 shall be amended or superseded, the nomination petition and nomination papers referred to in such section shall be filed with the Secretary of State.

It Is Ordered, Adjudged, and Decreed Further that unless and until A.R.S., 1956, § 41-1295 shall be amended or superseded, the board or boards of supervisors concerned, as the case may be, shall canvass the returns and enter of record official returns as provided in A.R.S., 1956, § 16-984A, and forthwith mail a certified copy to the Secretary of State; and the Secretary of State shall declare the person elected and deliver such person a certificate of election as provided in A.R.S., 1956, § 16-992.

It Is Ordered, Adjudged, and Decreed Further that unless and until A.R.S., 1956, § 41-1206 shall be amended or superseded, the statement of campaign receipts and expenditures provided for in such section shall be filed with the Secretary of State.

It Is Ordered, Adjudged, and Decreed Further that unless and until A.R.S., 1956, § 41-1207 shall be amended or superseded, when the Governor does not call a special election within two days after a vacancy in the legislature occurs, such vacancy may be filled by appointment in the following manner:

If the vacancy occurs within either of Legislative Districts 7 or 8, the board of supervisors of the county concerned shall forthwith appoint a qualified elector belonging to the same political party and residing at the time of appointment in the same legislative sub-district as his immediate predecessor in office.

If the vacancy occurs in either of Legislative District 4 or 6, the board of supervisors of the county where th vacancy occurs shall forthwith appoint a qualified electo belonging to the same political party and residing at th time of appointment in the same legislative district as hi immediate predecessor in office.

If the vacancy occurs in any of Legislative Districts 2, 3, or 5, then the members of the boards of supervisors o the counties comprising the legislative district shall, withi five days after the expiration of the time within which th Governor might have called a special election, by majorit vote of the total membership of such boards appoint qualified elector belonging to the same political party an residing at the time of appointment in the same legisla tive district as his immediate predecessor in office. In th event the members of such boards are unable to agree upo an appointee within such five-day period, then the appoint ment of a qualified elector belonging to the same politica party and residing at the time of appointment in the sam legislative district as his immediate predecessor in offic shall forthwith be made by the board of supervisors of th county within which such immediate predecessor resided

Dated: Dec. 5, 1966.

/s/ Walter L. Pope
United States Circuit Judge

James A. Walsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Civ. No. 5112—Phx.

Gary P. Klahr, *Plaintiff*,

v.

Jack Williams, Governor of the State of Arizona, and Wesley Bolin, Secretary of State of the State of Arizona, *Defendants*.

Petition of Richard Duffield in His Individual Capacity and as Chairman of the Democratic Party of Arizona and the Democratic Party of Arizona for Permission To Intervene as Parties

and

Motion To Declare Unconstitutional House Bill 1 of the First Special Session of the 28th Legislature of the State of Arizona, or in the Alternative To File Amicus Curiae Brief

The petitioners respectfully show unto the Court that the Legislature of the State of Arizona at the First Special Session of the 28th Legislature has heretofore adopted a certain bill to reapportion the legislature of the State of Arizona, known as House Bill 1, as amended, and that said bill is obviously unconstitutional and void in that by planned and deliberate action the said legislative enactment has sought to free the 28th Legislature of the State of Arizona from any restraint whatsoever in the reapportionment of the legislature of the State of Arizona in blatant and obvious defiance and contempt of the decree of this Honorable Court, of the decisions of the Supreme Court of the United States and of the Constitution of the United States interpreted by the said decisions, and further has constituted a vicious, unconscionable and unconstitutional gerrymandering of the State of Arizona for the open and notorious purpose of depriving the citizens of the said state of their right to free and equal representation; and for other reasons set forth herein the bill is unconstitutional.

That your petitioner, Richard Duffield, is a resident vote and citizen of the State of Arizona and brings this petitio in his own right and on behalf of all the resident voter and citizens of the State of Arizona; that he is also th duly elected chairman of one of the two major politica parties of the State of Arizona, to-wit: the Democrati Party, and brings the petition also on behalf of all member registered as voters in said Party who are likewise dis criminated against and deprived of their rights in the sam manner as your petitioner herein.

That the Democratic Party, which has been organize pursuant to Arizona Revised Statutes, Secs. 16-233 throug 16-236 brings this petition in its own name and allege that the rights of the members of this Party have bee violated by this proposed bill in the manner alleged above A political party created by statute has standing to b recognized as a proper party in litigation.

The plaintiff in the original action herein, to-wit: Gar Peter Klahr, was a resident voter and citizen of the Stat of Arizona, acting within his rights as such citizen; tha the original plaintiff herein does not necessarily represen the interests of your petitioners and those similarl situated.

That your petitioners, assuming favorable action by thi Honorable Court on this petition to intervene herein move this Court to declare void as unconstitutional the so-called reapportionment legislation of the 28th Legislature of th State of Arizona, which is more particularly identified a House Bill 1, as amended, of the First Special Session of the 28th Legislature of the State of Arizona, on the general grounds set forth in the first paragraph of this petition and more fully expounded in the memorandum of points and authorities appended hereto and made a part hereof.

In summary, it is the position of your petitioners that the Legislature, having been given an opportunity to formu-

late an appropriate and constitutional reapportionment plan, and having failed, that the Court's temporary plan be adopted as the plan up to the time of the Federal decennial census in 1970, or at least for the 1968 elections.

Respectfully submitted,

GOREY & ELY

By HERBERT L. ELY
Attorneys for Richard Dunfield, in his individual capacity and as Chairman of the Democratic Party of Arizona, and The Democratic Party of Arizona
724 Arizona Bank Building
Phoenix, Arizona

Copies of the foregoing mailed this 7th day of June, 1967 to:

Attorney General of the State of Arizona
State Capitol
Phoenix, Arizona

and to

Felke, Simon & Smart
101 South Fifth Avenue
Scottsdale, Arizona

HERBERT L. ELY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Civil No. 5112-PHX.

GARY PETER KLAHR, *Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona and WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants*.

Opposition to Petition of Richard Duffield To Intervene as a Party Herein

COME Now the defendants herein by and through DARRELL F. SMITH, The Attorney General of the State of Arizona, JOHN M. MCGOWAN, Special Assistant Attorney General, and PHILIP M. HAGGERTY, Special Counsel to the Attorney General, and respectfully move this Honorable Court for its order denying the petition of RICHARD DUFFIELD in his individual capacity as Chairman of the Democratic Party of Arizona, and of the Democratic Party of Arizona for permission to intervene as parties herein. In support of this position, defendants would show the court as follows:

NO PREVIOUS INTERVENORS HAVE BEEN ALLOWED

There have been three attempts during the course of this litigation by various persons or groups to intervene as parties. None have been allowed by the court. There was a petition filed by Norman Green, then County Attorney of Pima County, to intervene on behalf of various county officials. This was denied. There was a petition to intervene filed by Sheldon Mitchell on behalf of various individual voters. This was also denied. There was a petition filed by Jack Cavness on behalf of the then United States

Congressman George E. Senner. This was likewise denied, although at the time of trial, Congressman Senner was allowed to present argument. It was the belief of the court then, and we see no substantial change of circumstances to change such a belief now, that the addition of other parties to the case serves no useful purpose and merely clutters the record and makes the process of arriving at a decision a more cumbersome task.

This court is by now quite familiar with the State of Arizona, its history, its political, social, economic and geographic makeup. It has shown itself quite capable of arriving at an independent decision regardless of the agreement of the parties now before it. The only facts which are now in existence which this court did not have at the time of its original decision setting the legislative districts for the 1966 elections are the 1966 registration figures. Insofar as they may be important, they will be certified in court by the defendants herein and need no special pleading as they are simply a matter of statistics.

The defendants believe also that if this petitioner is entitled to intervene, then so is the Republican Party by its Chairman. And, in fact, so would almost any other citizen of the State who has some thoughts on the subject. In an area of the law where the guidelines are new, and the problems different and difficult, it would seem an invitation to add to these problems by allowing such a petition.

The Petition Does Not State a Cause of Action

Neither the petition nor the so-called exhibits attached thereto show in any respect that there has been any violation of the norms previously set down by the Supreme

Court of the United States and carried out by this court We attach as Exhibit A the legislation in issue. The Legislature is obviously faced with a problem that there is no breakdown of actual census population for districts which comprise less than a county. In other words, if you use county population figures for the small counties you can arrive at an actual determination of one man one vote. But inside Maricopa and Pima Counties, there are no population statistics which relate to precinct boundary lines and the Legislature was forced as this court was forced in its original decision, to consider voter registration where that was the only figure available. A glance at Exhibit No. 3 of the petitioner will show that the greatest deviations are minus 15.1% from the ideal in the Cochise-Graham combine and a plus 8.6% in the Gila-Pinal combine. On the face of this there has been no impermissible deviation. The deviation by voter registration in some counties is a good deal more than this (Ex. 4), but we believe that the court realizes that this deviation is caused by the fact that large numbers of Indians simply do not register and this accounts for the great disparity in voter registration in Apache, Greenlee, Coconino and Navajo counties. But we have been told by the Supreme Court of the United States and by this court that voter registration may not be used as a guide, at least where population statistics are available. In these counties where there is a great deviation by voter registration, population statistics are available, and therefore the Legislature was forced to use them.

There has been no claim made that in the individual subdistricting inside Pima and Maricopa Counties that there is any great disparity between the various districts. None of the affidavits of the individual legislators, even if they could be considered by this court, show undue representation or over-representation in any particular

Various members of the Legislature are somewhat concerned as they might lose some of the special interest protection, though the courts have already held that this is not something to be considered in setting new boundaries. The Honorable Tony Carillo of Pima County for example says:

> "*I* lose 25 of 29 precincts, and take in 21 new precincts and move to a new district, and have *my* boundary moved 140 miles."

We do not believe that either the Legislature or this court is obligated to recognize any "grandfather" rights to an election district in any one member of the Legislature. We are normally of the opinion that the voters control the precincts and the districts, not the incumbent.

See also the affidavit of The Honorable Tony R. Abril, Exhibit No. 6P,

> "Many of the Mexican-American voters and Negro voters have been combined with voters of completely different interests and their representation thereby has been severely deluded."

Apparently, Mr. Abril would only be happy if districts were set so that racial or ethnic groups were in fact set apart in their own districts. This type of division or districting must be on the face of it utterly condemned. All State Legislators have been enjoined that they are not to count trees or cattle, but people. The claim of the petitioner does not allege that there has been any deviation in the setup adopted by the Legislature as Chapter 1, 28th Legislature, First Special Session, they simply have not stated a reason why this law is unconstitutional.

What May Happen in the Future Is Not for This Court To Decide Now

Petitioner has taken considerable time to explain that under the provisions for future apportionment the Legislature has not set to itself guidelines in conformity with the one man, one vote rule. These provisions of the law now found in A.R.S. § 16-1404 provide that following the 1970 and every subsequent decennial census, the Legislature shall review the election districts and make any changes necessary. By further provisions of law if the Legislature does not do so, a special apportionment committee has the task devolved on it.

The petitioner claims that no standards have been set for the Legislature, while a number of clear and accurate standards have been set for this apportionment committee.

However, since there has been no 1970 census, and no Legislature has, in fact, had a chance to act upon these figures, the petitioner is in the position of asking the court to strike down what might be done by a future Legislature. This petitioner cannot do. A law cannot be held to be unconstitutional when, in fact, there is no law. No Legislature can bind a future Legislature. A Legislature can, however, in fact, bind an administrative agency or commission such as the apportionment committee. As a matter of fact, it does have a duty to set standards and guidelines for such an agency, and it has done so. But it is without power to set guidelines for itself in the future in any effective way. Therefore, it would have been a useless act for the 1966 Legislature to set standards for a 1971 Legislature which could completely ignore whatever went before.

Nor can it be presumed that any future Legislature will, in fact, violate the due process clause by setting up a districting statute which would be invalid. This court

can and should consider what is actually before it, that is, the apportionment and districting regulation for the conduct of the 1968 General Election. The petitioner simply has no standing to challenge what might or might not happen in the future.

Conclusion

It is therefore respectfully submitted that this court has before it sufficient parties and all the evidence which it needs to make a determination as to the validity of the redistricting as set forth by Chapter 1, 28th Legislature, First Special Session. The population statistics and the voter registration statistics insofar as they may be of use are available to the court as matters of public record. The actual boundaries of the precincts are also before the court by reason of the Legislative Act. The persons seeking to intervene have not claimed or shown that there is any significant deviation from an acceptable norm either by population or voter registration. The Legislators who have opposed the law have done so on the strength of their own affidavits for basically personal reasons aligned to their own political advantage or disadvantage. We believe that we can show to the court that by the basis of voter registration, of the 32 districts in the State, 26 had a clear majority of Democratic registered voters. This means that on a district by district count, there are 81% of the districts set forth by this Legislature which have Democratic majorities. But by actual registration in the State, only a fraction more than 60% of the registered voters in the State are registered Democrats. It simply does not make sense to say that a Republican Legislature redistricted the State where in effect 80% of the districts represent areas in which the Democrats have a majority and thus the Republicans have only a 20% chance of winning seats to the House, where by mathematics they have a 40% chance.

If this is gerrymandering, we are sure that somebody could have done a better job than that.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General

s/ JOHN M. McGOWAN
John M. McGowan
Special Assistant Attorney General

s/ PHILIP M. HAGGERTY
Philip M. Haggerty
Special Counsel to the Attorney General

Copy of the foregoing mailed
this 28th day of June, 1967, to:

FELKE, SIMON & SMART
101 West Fifth Avenue
Scottsdale, Arizona 85251
Attorneys for Plaintiff

GOREY & ELY
724 Arizona Bank Building
Phoenix, Arizona 85003

s/ JOHN M. McGOWAN

IN THE UNITED STSTATES DISTRICT COURT
FOR THE DISTSTRICT OF ARIZONA

No. Civ-5-5112 Phoenix

GARY PETER h KLAHR, *Plaintiff*,

v.

JACK WILLIAMS, Governor r of the State of Arizona, and WESLEY BOLIN, Secretatary of State of the State of Arizona, *Defendants*.

Or Order

It appearing to the Courtirt that there were filed with the Secretary of State of the StState of Arizona, within ninety days after the adjournmentat of the Firth Special Session, Twenty-eighth Legislature, e, State of Arizona, referendum petitions against Chapter r 1, Twenty-eighth Legislature, First Special Session, beariaring the signatures of qualified electors sufficient in numberer to require the submission of said Chapter 1 to the peoplecle of Arizona at the general election to be held in 1968, so so that said Chapter 1 will not become law unless and until til approved by a majority of the votes cast thereon at the 1961968 General Election and upon proclamation of the Governornor of Arizona; and good cause appearing therefor,

IT IS ORDERED, ADJUDGED, AD, AND DECREED:

1. That the motion of plaplaintiff filed herein on May 8, 1967, asking that the Court rt require defendants to conduct future primary and generalral elections in such manner that candidates for the Arizona LA Legislature and for the National House of Representatives os from Arizona will run "at large", is denied.

2. That ruling on the petitetition of Richard Duffield, individually and as Chairman an of the Democratic Party of Arizona, and the Democratictic Party of Arizona to intervene

as parties herein is deferred until such time as Chapter 1, Twenty-eighth Legislature, First Special Session, becomes law, if it should become law.

3. That the Decree entered herein on February 2, 1966, and the First and Second Supplemental Decrees entered herein on March 14, 1966 and December 5, 1966, respectively, redistricting the Congressional districts of Arizona and reapportioning both Houses of the Arizona Legislature shall apply to and govern primary, general, and special elections which may be held hereafter until the legislative authority of the State of Arizona shall have adopted different, valid, and effective plans for redistricting and reapportionment, or until the further order of the Court.

DATED: December 4, 1967.

WALTER L. POPE
Senior United States Circuit Judge

JAMES A. WALSH
United States District Judge

WALTER E. CRAIG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ-5112 Phx.

GARY PETER KLAHR, *Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of the State of Arizona, *Defendants*.

Order Granting Petition for Intervention

Good cause appearing therefor, and the members of the Court agreeing unanimously,

IT IS ORDERED that leave is granted to Richard Duffield, individually, and as Chairman of the Democratic Party of Arizona, to intervene as a plaintiff in this action.

DATED: November 27, 1968.

FOR THE COURT:

JAMES A. WALSH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ-5112 Phx.

GARY PETER KLAHR, *Plaintiff*,

RICHARD DUFFIELD, individually, and as Chairman of the Democratic Party of Arizona, *Intervenor-plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, ET AL., *Defendants*.

Opinion and Decision

Before: JERTBERG, Senior Circuit Judge, and District Judges WALSH and CRAIG

PER CURIAM

The Arizona Legislature chosen at the 1966 state election held in conformity with the decree of this court (*Klahr v. Goddard, Governor, etc.*, 250 P. Supp. 537; 254 P. Supp. 997), in June, 1967, enacted Chapter 1, Twenty-eighth Legislature, First Special Session, (hereinafter "Chapter 1"), apportioning both the Senate and the House of Representatives of Arizona. Shortly thereafter, pleadings filed herein by the parties sought a determination by the court as to the validity of Chapter 1, plaintiff and defendants seeking a ruling that the legislation is valid, and intervenor-plaintiff contending it must be held unconstitutional under the decisions of the United States Supreme Court relating to apportionment of state legislatures. When referendum petitions were filed against Chapter 1, so that it would not become law unless and until approved by a majority of the votes cast thereon at the 1968 general election, we deferred a hearing as to the validity of Chapter 1 until the time when, if ever, it became effective.

Chapter 1 received the support of the majority of those voting upon it at the 1968 general election and, the Gov-

ernor of Arizona having thereafter proclaimed it in force and effect, on January 17, 1969, we held the deferred hearing. [See footnote 1.] On April 7, 1969, the Supreme Court of the United States decided *Kirkpatrick, Secretary of State of Missouri, et al.*, v. *Preisler, et al.*, 394 U.S. 526, 22 L.Ed. 2d 519, 89 S.Ct. ——, and *Wells* v. *Rockefeller*, as *Governor, et al.*, 394 U.S. 542, 22 L.Ed. 2d 535, 89 S.Ct. ——. These decisions require that we hold Chapter 1 to be unconstitutional and invalid.

Chapter 1 provides that, beginning with the Twenty-ninth Arizona Legislature, the State of Arizona is divided into seven election districts; and the election districts are subdivided into legislative districts, from each of which there will be elected one senator and two representatives. The plan of Chapter 1 is for the entire membership of the legislature to be apportioned among the election districts on the basis of population; but Chapter 1 provides, further, that the number of legislators apportioned to each election district shall be apportioned among its legislative districts on the basis of voter registration. With respect to election districts, Chapter 1 permits until 1971 a deviation from the ideal population per district of as much as 15% [See footnote 2.]; and in 1971 and thereafter, a deviation from the ideal population per district of 16%, plus or minus, is allowable. With respect to legislative districts, Chapter 1 permits until 1971 a deviation from the ideal voter registration per district of as much as 40%

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[1] The membership of the Court at the time of the hearing comprised the late Senior Circuit Judge Walter L. Pope and District Judges Walsh and Craig. Judge Pope died on March 27, 1969. The court was reconstituted on April 3, 1969, with Senior Circuit Judge Gilbert R. Jertberg and District Judges Wals and Craig as members.

[2] The most populous election district may be approximately 8.6% above the mathmatical ideal and the least populous district approximately 15.1% below.

[See footnote 3.]; and in 1971 and thereafter a deviation from the ideal voter registration per district of 16%, plus or minus, is allowable.

It is quite evident that the legislature in enacting Chapter 1 had the belief that a population variance among election districts of not more than 16%, plus or minus, from the ideal election district population satisfied the constitutional requirements for valid apportionment of such districts. [See footnote 4.] It is evident, too, that with respect to legislative districts the legislature assumed that a like percentage variance of registered voters among legislative districts was permissible. But *Kirkpatrick* and *Wells* hold that the establishment by a state legislature of a fixed percentage population variance which the legislature will consider *de minimis* is inconsistent with and will not satisfy the constitutional requirements that states make their Congressional districts and their state legislative districts as nearly of equal population "as is practicable". [See footnote 5.] *Wesberry* v. *Sanders*, 376 U.S. 1, 18, 11 L. Ed. 2d 481, 492, 83 S.Ct. 1691; *Reynolds* v. *Sims*, 377 U.S. 533, 577, 12 L.Ed. 2d 506, 536, 84 S.Ct. 1362. *Kirkpatrick* held, further, that even if the court were to assume that apportionment might be based upon eligible voter population rather than total population [See footnote 6.], the

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[3] This is on the basis of voter registration figures for the 1966 General Election. The legislative district containing the greatest number of registered voters may be approximately 24.26% above the mathmatical ideal and the legislative district containing the smallest number of registered voters approximately 40% below.

[4] At the time Chapter 1 was enacted by the Legislature, the case reports and legal literature with respect to redistricting and reapportionment furnished some apparent justification for this belief.

[5] The redistricting of Congressional districts found invalid in Kirkpatrick had resulted in maximum variations from ideal population of from plus 3.13% to minus 2.84%. In *Wells*, the variations ranged from plus 6.4888% to minus 6.608%.

[6] Though the court did make this assumption, it expressed the caveat that there may be a question as to whether apportionment on a basis other than total population can ever be permissible. 394

districts must be as nearly of equal eligible voter population as is practicable.

Nothing presented to the court upon the hearing would permit us to hold that the Legislature could not come any closer than it did in Chapter 1 to achieve population equality among the districts from which its senators and representatives are to be elected. To the contrary, it appears plain that the Legislature assumed that so long as its reapportionment plan kept all election district deviations from ideal population within 16%, plus or minus, the constitutional tests for a valid apportionment were met. No evidence was presented which would justify either the population variance among the election districts or the registered voter variance among the legislative districts. We hold, therefore, that Chapter 1 is invalid for failing to meet the constitutional requirement of equal representation for equal numbers of people as nearly as is practicable.

Having held that Chapter 1 is invalid, it results that the decree and supplemental decrees heretofore entered in this case redistricting the Congressional Districts of Arizona and reapportioning both Houses of the Arizona Legislature govern primary, general, and special elections which may be held hereafter until the Legislature shall have adopted different, valid, and effective plans for redistricting and reapportionment, or until the further order of the court. However, while agreeing that Chapter 1 is invalid, plaintiff Klahr points out that the population variances among the Arizona Congressional districts, as established by this court's decree, are inconsistent with the rule established in *Kirkpatrick* [See footnote 7.], and he asks that

U.S. 534. In Arizona, the evidence suggests rather strongly that apportionment on the basis of registered voters would result in under-representation of the people in Apache and Navajo Counties (R.T., pp. 187, et seq.).

[7] Apparently, population variances in reapportionments accomplished by court decree on an emergency basis may be permissible when the same variances would invalidate a legislative reapportionment. *Kirkpatrick*, 394 U.S. 532, fn. 2.

we forthwith order defendants to conduct the 1970 and all subsequent primary and general elections for the offices of Representatives in Congress, State Senator, and State Representative in a manner whereby the candidates for such offices will "run at large" within the State of Arizona. Since we are cognizant of the fact that redistricting and reapportioning are the constitutional duty of the Legislature and not that of this court, we decline to enter such an order at this time. *Kirkpatrick* and *Wells* have now expounded what is required of a legislature if its redistricting and reapportioning work is to be constitutionally acceptable. There is ample time prior to the date that the machinery for conducting the 1970 elections must be set up for the Arizona Legislature to meet its obligation. If it fails, plaintiff may renew his request for relief, since the same will be within our continuing jurisdiction.

DATED: July 22, 1969.

EXHIBIT A

STATE OF ARIZONA
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
STATE OF ARIZONA } ss.

I, WESLEY BOLIN, Secretary of State, do hereby certify that the attached document is a true, correct and complete copy of Chapter 1, House Bill No. 1, twenty-ninth legislature, first special session; that I am the official of the State of Arizona having custody and control of the original of said copy and the Legal keeper thereof.

[SEAL]

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Great Seal of the State of Arizona. Done at Phoenix, the capital, this 5th day of February A.D. 1970.

WESLEY BOLIN
Secretary of State

[SEAL]

State of Arizona
House of Representatives
First Special Session
Twenty-ninth Legislature

CHAPTER 1

HOUSE BILL 1

AN ACT

RELATING TO ELECTIONS; PROVIDING FOR THE COMPOSITION AND APPORTIONMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES; PRESCRIBING CONGRESSIONAL DISTRICTS; PROVIDING FOR THE ADJUSTMENT OF BOUNDARIES OF PRECINCTS BY BOARDS OF SUPERVISORS; REPEALING TITLE 16, CHAPTER 11, ARIZONA REVISED STATUTES; AMENDING TITLE 16, ARIZONA REVISED STATUTES, BY ADDING A NEW CHAPTER 11, ARTICLE 1, AND REPEALING SECTIONS 16-727 and 41-1251, ARIZONA REVISED STATUTES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. *Repeal*

Title 16, chapter 11, Arizona Revised Statutes, is repealed.

Sec. 2. Title 16, Arizona Revised Statutes, is amended by adding chapter 11, article 1, sections 16-1401, 16-1402 16-1403, to read:

CHAPTER 11

MEMBERSHIP AND APPORTIONMENT OF LEGISLATURE AND ESTABLISHMENT OF CONGRESSIONAL DISTRICTS

ARTICLE 1. IN GENERAL

16-1401. *Membership of legislature*

Commencing with the thirtieth legislature, the senate shall consist of thirty members and the house of representatives of sixty members.

16-1402. *Legislative districts*

A. For the thirtieth legislature and until changed by the legislature, the legislative districts shall be established as provided in this section.

B. The legislative districts shall consist of geographic areas, and one senator and two representatives shall be elected from each such district. These areas, described by the precinct or a part of such precinct as herein described, or county names or numbers, or both, as established on January 1, 1970, are set forth as follows:

Districts	Description
1	Maricopa county Aguila, New River, Wickenburg No. 1, Wickenburg No. 2. Mohave county Alamo, Bullhead, Chloride, Country Club, Davis Dam, Dolon Springs, Hackberry, Hilltop, Haulapai, North Kingman, South Kingman, East Kingman No. 1, East Kingman No. 2, West Kingman, Lake Havasu, Logasville, Mohave Valley, Oatman, Peach Springs, Riviera, Topock, Wikieup, Yucca. Yavapai county Bagdad, Beaver Creek, Bumblebee, Camp Verde, Camp Wood, Canyon, Castle Hot Springs, Cherry Creek, Childs, Chino Valley, Clarkdale, Cleator, Congress, Constellation, Cottonwood #1, Cottonwood #2, Crown King, Groom Creek, Hillside, Humboldt, Jerome, Kirkland, Mayer, Miller Valley East, Miller Valley West, Oak Creek, Prescott Northeast, Prescott Northwest, Prescott North, Prescott West, Prescott South, Prescott Southwest, Red Rock, Rincon, Skull

Districts	Description
	Valley, Wagoner, Walnut Creek, Walnut Grove, Whipple, Yarnell.
	Yuma county
	Bouse, Parker No. 1, Parker No. 2, Wenden.
2	All of Coconino county.
	Mohave county
	Cane Beds, Colorado City, Littlefield, Moccasin, Mount Trumbull.
	Yavapai county
	Ash Fork, Seligman.
3	Apache county
	Chinle, Teec Nos Pos.
	Gila county
	Globe No. 9, Globe No. 10, Gisela, Payson No. 1, Payson No. 2, Pine, Young.
	Graham county
	Bylas No. 13.
	Navajo county
	Winslow #1, Winslow #2, Winslow #3, Winslow #4, Winslow #5, Winslow #6, Winslow #7, Winslow #8, Oraibi, Polacca, Tees To, Toreva, Holbrook #1, Holbrook #2, Holbrook #3, Holbrook #4, Indian Wells, Joseph City, Kayenta, Keams Canyon, Pinon, Woodruff, Snowflake #1, Snowflake #2, Taylor, Showlow #1, Showlow #2, Whiteriver, Cibecue, Heber, Overgaard, Clay Springs, Pinedale, Linden.

Districts	Description
4	Apache county
	Alpine, Concho, Eagar, Ft. Defiance, Ganado, Greer, Lukachukai, Lupton, McNary, Nutrioso, Puerco, Springerville, St. Johns, St. Michaels, Vernon, Wide Ruins.
	Graham county
	Solomon No. 1.
	All of Greenlee county.
	Navajo county
	Pinetop, Lakeside.
5	Maricopa county Gila Bend.
	Yuma county
	Yuma #2, Yuma #3, Yuma #4, Yuma #5, Yuma #6, Luma #7, Yuma #8, Yuma #9, Yuma #10, Yuma #11, Yuma #12, Yuma #13, Yuma #14, Yuma #15, Yuma #16, Yuma #17, Yuma #18, Yuma #19, Yuma #20, Yuma #21, Yuma #22, Cibola, Crane #1, Crane #2, Ehrenberg, Gadsden, Hyder, Laguna, Mahawk, Parker #3, Quartzsite, Roll, Rood, Salome, Somerton #1, Somerton #2, Vicksburg, Wellton.
6	Maricopa county
	Desert Baths, Dreamland, Jefferson, Oasis, Velda Rose.
	Pinal county
	Casa Grande #3, Queen Creek #4, Casa Grande #7, Eloy #9, Coolidge #11, Maricopa #13, Coolidge #15, Sacaton #16, Stanfield #18, Picacho #19, Apache Junction #20, Eloy #21, Casa Grande #22, Casa Grande #23, Coolidge

ricts	Description
	#24, Coolidge #26, Casa Grande #29, Casa Grande #30, Casa Grande #31, Casa Grande #32 Eloy #33, Apache Junction #35, Arizona City #38.
7	Gila county
	Globe #1, Globe #2, Globe #3, Globe #4, Globe #5, Globe #6, Globe #7, Globe #8, Globe #11, Miami #1, Miami #3, Miami #4, Miami #5, Claypool #1, Claypool #2, Claypool #3, Central Heights, Hayden #1, Winkelman, Christmas, Roosevelt, Tonto Basin.
	Pinal county
	Florence No. 1, Superior No. 2, Superior No. 6, Oracle No. 8, Red Rock No. 10, Ray No. 12, Florence No. 14, Kearney No. 17, San Manuel No. 25, San Manuel No. 27, Kearney No. 28, Florence No. 34, Apache Junction No. 36, Superior No. 37, Superior No. 41, Superior No. 42.
8	Cochise county
	Benson #1, Benson #2, Bowie, Cochise, Douglas #1, Douglas #2, Douglas #3, Douglas #4, Douglas #5, Douglas #6, Douglas #7, Douglas #8, Douglas #9, Douglas #10, Dragoon, El Dorado, Lusk, McNeal, Paradise, Pearce, Pirtleville, Pomerene, San Simon, Tombstone, Webb, Whitewater, Willcox #1, Willcox #2, Willcox #3.
	Graham county
	Safford #2, Safford #3, Layton #4, Layton #5, Thatcher #6, Thatcher #7, Central #8, Pima #9, Eden #10, Ft. Thomas #11, Geronimo #12, Klondyke #14, Bonita #15.
	Pinal county
	Mammoth #5, Feldman #39.

Districts	Description
9	Cochise county
	Ash, Bisbee #1, Bisbee #2, Bisbee #3, Bisbee #4, Buena #1, Buena #2, Buena #3, Buena #4, Central Bridge, Don Luis, Hereford, Huachuca, Lowell #1, Lowell #2, Lowell #3, Naco, San Rafael, St. David, Warren #1, Warren #2, Warren #3, Warren #4.
	Pima county
	#29, #30, #39, #43, #131.
	All of Santa Cruz county.
10	Pima county
	#1, #2, #3, #4, #5, #10, #13, #27, #34, #35, #36, #37, #38, #55, #57, #59, #60, #61, #63, #65, #104, #107, #108, #109, #112, #128, #130, #135.
	Yuma county
	Aztec.
11	Pima county
	#6, #7, #8, #9, #11, #12, #14, #15, #16, #17, #18, #19, #20, #21, #22, #28, #41, #46, #58, #62, #64, #66, #79, #105, #110, #111, #139, #143.
12	Pima county
	#33, #40, #44, #67, #68, #69, #70, #75, #76, #97, #99, #100, #101, #102, #103, #118, #119, #122, #129, #132, #134, #138, #146.
13	Pima county
	#23, #24, #31, #45, #47, #48, #49, #50, #81, #82, #84, #85, #86, #87, #88, #106, #113, #125, #136, #137.

ricts	Description
4	Pima county #25, #26, #32, #51, #52, #53, #54, #71, #80, #89, #90, #91, #95, #96, #98, #114, #116, #120, #124, #126.
5	Pima county #42, #56, #72, #73, #74, #77, #78, #83, #92, #93, #94, #115, #117, #121, #123, #127, #133, #140, #141, #142, #144, #145.
6	Maricopa county Arlington, Buckeye #1, Buckeye #2, Dysart, Earll, Glendale #1, Glendale #2, Glendale #3, Glendale #4, Glendale #6, Glendale #7, Glendale #8, Highland, Harquahala, Holiday Gardens, Holiday Park, Indianola, Lexington, Liberty, Litchfield, Morristown, Orme, Salem, Starlight, St. Christopher, Sun Bowl, Sunset, Tonopah.
7	Maricopa county Adobe, Agua Fria, Altadena, Angell, Cactus, Campo Bello, Caron, Cave Creek, Century, Deer Valley, Desert Hills, Emerald, Gold Dust, Greenway, La Jolla, Marinette, Moon Valley, Peoria, Sahuaro, Shaw Butte, Shea, Sun City, Surrey, Trinity, Voltaire, Youngtown #1, Youngtown #2, Yucca, Webb.
8	Maricopa county Alta Vista, Ambassador, Augusta, Barcelona, Belmont, Catalina, Cholla, Cortez, Flynn, Gardenia, Granada—all that portion of Granada precinct east of 27th Avenue. Golden, Harmont, Keim, Lynhaven—all that portion of Lynhaven precinct east of 27th Avenue. Manzanita, Mary-

Districts	Description
	land, Montebello, Myrtle, Northview, Roma, Simpson, St. Simon, Sungold, Washington, Westwood—all that portion of Luke precinct east of 27th Avenue.
19	Maricopa county
	Desert Cove, Desert View, Diana, El Domingo, Glenn, Hatcher, Lupine, Marlette, McLellan, Meadows, Mountain View, Nile, Orangewood, Royal Palm, Solano, Sunny High, Sunnyslope, Wagon Wheel, Dreamy Draw—all that portion of Dreamy Draw lying west of 16th street and 16th street extended, Hayward—all except that portion of Hayward lying south of Northern and east of 7th street. Hazelwood—all that portion of Hazelwood lying west of 7th avenue, all that portion of Simis lying west of 7th street. Grandview—all that portion of Grandview lying east of 15th avenue. Westminster—all that portion of Westminster lying east of 15th avenue.
20	Maricopa county
	Biltmore, Cudia, Joshua, Kiva, Mockingbird, Brentwood, Camelback High, Glenrosa, Harvard, Kachina, LaFayette, Monte Vista, Olivette, Squaw Peak, St. Barnabas, St. George, Suncrest, Ventura, Yale, Zuni—all that portion of Geronimo lying west of 44th street.
21	Maricopa county
	Apache, Arcadia, Buckhorn, Chaparral, Honda, Hualapai, Ingleside, Maricopa, McDonald, Mohave, Navajo, Paiute, Paradise, Picadilly, Pima, Pueblo, San Carlos, Scottsdale High, Scottsdale West, Yuma, Orange, Hopi, Kaibab.

istricts	Description
22	Maricopa county Glendale No. 5, Glendale No. 9, Glendale No. 10, Alhambra, Andalucia, Cordova, Crittendon, Downs, Long, Maryvale High, Medlock, Mulberry, Ocotillo, Sevilla, St. Vincent, Valencia, West High, Whitton, Messiah, all that portion of Luke lying west of 27th avenue, all that portion Granada lying west of 27th avenue, all that portion of Lynhaven lying west of 27th avenue.
23	Maricopa county Avalon, Bethany, Central High, Citrus, Claremont, Desert Park, Lamar, Lawrence, Madison No. 1, Madison No. 2, Madison No. 3, Madison Park, Mount Calvary, Osborn, Plaza, Rancho, Rose Lane, Rovey, St. Francis, St Thomas, all that portion of Dreamy Draw lying east of 16th street and 16th street extended, all that portion of Hayward lying each of 7th street and south of Northern avenue, all that portion of Simis lying east of 7th street.
24	Maricopa county Brill, Capitol, Carnation, Clarendon, College, Emerson, Encanto, Flower, Flanklin, Kenilworth, Los Olivos, McKinley, Mitchell, Monterey, North High, Palmcroft, St. Gregory, Turney, Westview, Willetta, Wilshire, YMCA, Hazelwood—All that portion of Hazelwood precinct lying east of 7th Avenue, Grandview—all that portion of Grandview lying west of 15th Avenue, Westminster—all that portion of Westminster lying west of 15th Avenue.

Districts	Description
25	Maricopa county Balsz, Belleview, Cavalier, Creighton, Crockett, East High, Edgemont, Fairmount, Garfield, Griffith, Holly, Hunt, Loma Linda, Longview, Machan, Palm, Papago, St. Agnes, Whittier, Windsor, all that portion of King lying east of 28th Street.
26	Maricopa county Cochise, Coronado, Hohokam, Oak Park, Salt River, St. Daniel, Supai, Tempe #1, Tempe #2, Tempe #3, Tempe #4, Tempe #13, Tempe #14, Tempe #15, Tempe #22, Tempe #23, Tonalea, Tonto, Yavapai, Barnes, Gardens, all that portion of Geronimo lying east of 44th Street.
27	Maricopa county Avondale, Brown, Butler, Cartwright, Cash, Cashion, Cheery Lyn, Coe, Durango, Gila Crossing, Goodyear, Grand Avenue, Harrison, Hayden High, Isaac, Jackson, Latham, Laveen, Madrid, Murphy, Riverside, Sullivan, Sutton, Tolleson, Zito.
28	Maricopa county Bethune, Broadway, Court, Dunbar, Edison, Hermosa, Hialeah, Hope, Julian, Lincoln, Longfellow, Lowell, Monroe, Okemah, Palmdale, Parkview, Rio Vista, Sierra Vista, Skiff, Sky Harbor, South Mountain High, Southminster, Sunland, Wilson, all that portion of King lying west of 28th Street.

Districts	Description
29	Maricopa county Chandler #1, Chandler #2, Chandler #3, Chanlder #4, Chandler #5, Gilbert, Guadalupe, Higley, Kyrene, Queen Creek, Tempe #5, Tempe #6, Tempe #7, Tempe #8, Tempe #9, Tempe #10, Tempe #11, Tempe #12, Tempe #16, Tempe #17, Tempe #18, Tempe #19, Tempe #20, Tempe #21, Tempe #24, Barr, Roosevelt, Thunderbird, Valley View.
30	Maricopa county Lehi, Mesa #1, Mesa #2, Mesa #3, Mesa #4, Mesa #5, Mesa #6, Mesa #7, Mesa #8, Mesa #9, Mesa #10, Mesa #11, Mesa #12, Mesa #13, Mesa #14, Mesa #15, Mesa #16, Mesa #17, Mesa #18, Mesa #19, Mesa #20 Mesa #21.

16-1403. *Congressional districts enumerated*

For the purpose of selecting by and from districts the number of representatives in congress to which the state is entitled, the congressional districts, described by the counties, legislative districts as prescribed in section 16-1402 and the precincts as established on January 1, 1970, shall be as follows:

1. Congressional district No. 1 shall comprise the following: Legislative districts 20, 21, 23, 25, 26, 28, 29, 30 plus all that portion of legislative district 6 lying in Maricopa county, plus the following precincts in legislative district 7—Campo Bello, Cave Creek, Century, Cactus, Gold Dust, Greenway, Moon Valley, Shea, Trinity, Yucca, plus the following precincts in legislative district 19—Desert Cove, Desert View, El Domingo, Hatcher, Meadows, Sunny High, Sunnyslope, Wagon Wheel, all that portion of Dreamy

Draw lying west of 16th street and 16th street extended, all of Hayward except that portion lying south of Northern avenue and east of 7th street, all that portion of Simis lying west of 7th street, plus all those precincts in legislative district 24 except that portion of Grandview lying west of 15th avenue, and except that portion of Westminister lying west of 15th avenue and north of Campbell avenue.

2. Congressional district No. 2 shall comprise the following counties: Cochise, Pima, Pinal, Santa Cruz and Yuma.

3. Congressional district No. 3 shall comprise the following counties: Apache, Coconino, Gila, Graham, Greenlee, Mohave, Navajo, Yavapai, plus all that portion of Maricopa county not included in congressional district No. 1.

Sec. 3. *Adjustment of boundaries of precincts by board of Supervisors*

The board of supervisors shall within thirty days after the effective date of this act, adjust the boundaries of precincts within a legislative district to provide convenient polling places for the electors.

Sec. 4. *Repeal*

Sections 16-727 and 41-1251, Arizona Revised Statutes are repealed.

Approved by the Governor—January 22, 1970

Filed in the Office of the Secretary of State—January 22, 1970

EXHIBIT B

COUNTY GOVERNMENTAL COMPLEX
OFFICE OF THE MARICOPA COUNTY RECORDER

Paul N. Marston, Recorder Paul A. Thomas, Chief Deputy

103 County Administration Building
111 South Third Avenue, Phoenix, Arizona

February 9, 1970

The Honorable William S. Porter
President of the Senate
Senate Wing, Capitol Building
Phoenix, Arizona 85007

The Honorable John H. Haugh
Speaker of the House
House Wing, Capitol Building
Phoenix, Arizona 85007

Gentlemen:

I am writing to explain in further detail the techniques which were employed in the reapportionment program and the rationale behind them. Let me begin with the rationale.

As you know, the reapportionment committee was at a loss as to whether they should employ 1960 census data or 1968 voter registration, or some combination of both in an updated reapportionment plan.

In writing the computer program, which subsequently produced the plan adopted by the Legislature, I had to make some decisions about which data should be included in the computer program. I rejected using pure 1960 census data for three reasons. First, it has been well-established that, due to the phenominal growth of Arizona, these figures are sadly out of date. Secondly, it has been further established that the use of pure 1960 census data would effectively disenfranchise the newcomer to Arizona.

Thirdly, there is the fact that there is almost no relationship between census tract and enumeration district boundaries and our political precinct boundaries; making it impossible to arrive at an accurate figure for a 1960 census count within an existing precinct.

I considered using census tracts instead of precincts and letting the various counties fit their precinct structure to the census tracts. This proposal was rejected because, quite often, the census tracts were unsuitable for use as a political precinct, even when subdivided; and, secondly, because we discovered that there were no legal descriptions for the census tracts, making it impossible to draft a bill employing same.

Also considered was the possibility of using pure 1968 voter registration data, as this count is available on a precinct by precinct basis, and this figure does tend to show where the people live now, as opposed to where they lived ten years ago. This approach was rejected, since it has been contended, with some justification, that the use of voter registration data disenfranchises minority groups, particularly Indians, who are much less likely to register to vote.

We were faced then with the problem of neither of the readily available statistics being able to satisfactorily do the reapportionment job.

Our solution was to adopt the approach that the Federal District Court took in its temporary plan, when they used 1960 census data when dealing with whole counties and the most recent voter registration data to subdivide inside counties. The advantage of this approach, I felt, was that the census data gave weight to a county for all of the people within it, whether registered to vote or not, and yet gave weight to the people who have moved to Arizona in recent years. In this fashion we can give weight to the minority groups and to the newcomer without disenfranchising either.

Our first problem was to devise some method of converting voter registration to census figures, or vice versa, since the two cannot be added together any more than apples and oranges can be added together. A formula was adopted which converted 1968 precinct voter registration to 1960 precinct population. The formula is as follows:

$$\text{1968 Precinct Voter Registration} \times \frac{\text{1960 County Population}}{\text{1968 County Registration}} = \text{1960 Precinct Population}$$

This formula is best understood by realizing that a certain percentage of the people registered to vote in a county reside within any given precinct, and by multiplying this percentage by the county census population, one can arrive at a precinct population figure.

The basic reason for the adoption of this formula in the reapportionment plan is that there did not seem to be any other way to proceed from a mechanical point of view. We could not get a census count by precinct, and we could not make the precincts fit the census boundaries. The plan devised uses 1960 census data for the counties and voter registration data within a county. The formula serves only as a means to cross county boundaries, and not mix apples and oranges. It should be emphasized that, with the use of this formula, in dealing with a county as a whole, you are using census data; and in dealing with a portion of a county, you are using voter registration data.

The computer program was designed to be able to cross county boundaries, since it was our interpretation of the most recent court decisions, that population deviations must be as close to zero as possible. To accomplish this goal, everything must be sacrificed, and that certainly includes county integrity. The results, I think, speak for themselves.

By using a computer, we were able to keep the deviations under 1%, and I personally feel that it is not possible with-

in any reasonable amount of time, to get them any lower than they are in the plan adopted by the Legislature. For these reasons, I believe that if the Court will accept the use of the mix of 1960 census and 1968 voter registration data, that they will uphold the Legislature's plan.

If you have any questions, or if I can be of any further service to you in this matter, just let me know.

Sincerely yours,

/s/ PAUL
Paul N. Marston
Maricopa County Recorder

PNM:ell

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-5112-Phx.

GARY PETER KLAHR, *Plaintiff*,

RICHARD DUFFIELD, individually, and as Chairman of the Democratic Party of Arizona, *Intervenor-Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, et al., *Defendants*.

Supplemental Exhibit Submitted by Defendants

COME Now the Defendants, by and through their attorney, and submit to this Honorable Court Chapter 1 of the Laws of 1970, First Special Session of the 29th Legislature, being more particularly described as House Bill 1, First Special Session, 29th Legislature, an Act, entitled:

> RELATING TO ELECTIONS; PROVIDING FOR THE COMPOSITION AND APPORTIONMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES; PRESCRIBING CONGRESSIONAL DISTRICTS; PROVIDING FOR THE ADJUSTMENT OF BOUNDARIES OF PRECINCTS BY BOARDS OF SUPERVISORS; REPEALING TITLE 16, CHAPTER 11, ARIZONA REVISED STATUTES; AMENDING TITLE 16, ARIZONA REVISED STATUTES, BY ADDING A NEW CHAPTER 11, ARTICLE 1, AND REPEALING SECTIONS 16-727 AND 41-1251, ARIZONA REVISED STATUTES.

A copy of said Chapter 1, duly authenticated by the Honorable Wesley Bolin, Secretary of State, State of Arizona, is attached hereto and designated Exhibit A.

There is also attached hereto, labeled Exhibit B, a copy of a letter from the Honorable Paul Marston, addressed to the President of the Senate and Speaker of the House, describing the method used in arriving at the division of the precincts into the various legislative districts. The procedure used was an attempt to arrive at mathematical exactness, as required in the recent decisions of the United

States Supreme Court in *Kirkpatrick, Secretary of State of Missouri, et al.* v. *Preisler, et al.*, 394 U.S. 526, 22 L.Ed. 2d 519, 89 S.Ct. 1225, and *Wells* v. *Rockefeller, as Governor, et al.*, 394 U.S. 542, 22 L.Ed.2d 535, 89 S.Ct. 1234.

Respectfully submitted,

/s/ Gary K. Nelson
Gary K. Nelson
The Attorney General

/s/ John M. McGowan
John M. McGowan
Special Assistant Attorney General

Copy of the foregoing Supplemental Exhibit mailed this 16th day of February, 1970, to:

Herbert L. Ely
Gorey & Ely
Attorneys for Intervenor
904 Arizona Title Building
Phoenix, Arizona 85003

Philip Shea
Suite 819
114 West Adams Street
Phoenix, Arizona 85003

Simon & Jekel
Attorneys for Plaintiff
101 West Fifth Avenue
Scottsdale, Arizona 85251

Evans, Kitchel & Jenckes
363 North First Avenue
Phoenix, Arizona 85003

/s/ John M. McGowan
John M. McGowan
Special Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 5112-Phx.

GARY PETER KLAHR, *Plaintiff*,

HERBERT L. ELY, individually and as Chairman of the Democratic Party of Arizona, *Intervenor-Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, et al., *Defendants*.

Notice of Substitution of Parties

To: The United States District Court for the District of Arizona and the parties to this action

PLEASE TAKE NOTICE that on January 10, 1970, Herbert L. Ely succeeded Richard Duffield as Chairman of the Democratic Party of Arizona and thereby, under the terms of Rule 25(d) Federal Rules of Civil Procedure, Herbert L. Ely became automatically substituted for Richard Duffield as the Intervenor-Plaintiff.

/s/ PHILIP J. SHEA
Philip J. Shea
Attorney for Intervenor-Plaintiff

On February 20, 1970,
the attorney for the
Intervenor-Plaintiff filed
the original and 3 copies of
this Notice and mailed copies to:

Gary K. Nelson
The Attorney General
Attorney for Defendants
State Capitol Building
Phoenix, Arizona
Attn: John McGowan
Special Assistant

Simon & Jekel
101 West Fifth Avenue
Scottsdale, Arizona 85251

Evans, Kitchel & Jenckes
363 [illegible]h First Avenue
Phoenix, Arizona 85003

/s/ PHILIP J. SHEA
Philip J. Shea
Attorney for Intervenor-Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 5112-Phx.

GARY PETER KLAHR, *Plaintiff*,

HERBERT L. ELY, individually and as Chairman of the Democratic Party of Arizona, *Intervenor-Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, et al., *Defendants*.

Motion for Hearing

The Intervenor-Plaintiff has studied the reapportionment statute enacted by the First Special Session of the Twenty-Ninth Legislature of the State of Arizona and approved by the Governor on January 22, 1970. He has also undertaken discovery procedures to determine the basis for determining population within the legislative districts established by this statute. Intervenor-Plaintiff has concluded that the statute is not constitutional because it substantially disenfranchises, unreasonably and unnecessarily, a large number of the citizens of the state.

Intervenor-Plaintiff moves the Court to order a hearing on the constitutional validity of this Act and on any other

appropriate matters. Intervenor-Plaintiff estimates that the evidence and argument that will be presented to the Court at this hearing will require two days.

Respectfully submitted on February 20, 1970.

/s/ PHILIP J. SHEA
Philip J. Shea
Attorney for Intervenor-Plaintiff

On February 20, 1970,
the attorney for the
Intervenor-Plaintiff filed
the original and 3 copies of
this Notice and mailed copies to:

Gary K. Nelson
The Attorney General
Attorney for Defendants
State Capitol Building
Phoenix, Arizona
Attn: John McGowan
Special Assistant

Simon & Jekel
101 West Fifth Avenue
Scottsdale, Arizona 85251

Evans, Kitchel & Jenckes
363 North First Avenue
Phoenix, Arizona 85003

/s/ PHILIP J. SHEA
Philip J. Shea
Attorney for Intervenor-Plaintiff

IN THE UNITED STATES DISTRICT COURT
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No. CIV 5112-Phx.

GARY PETER KLAHR, *Plaintiff*,

HERBERT L. ELY, individually and as Chairman of the Democratic Party of Arizona, *Intervenor-Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, et al., *Defendants*.

Trial Memorandum

The intervenor-plaintiff challenges the reapportionment plan contained in Chapter 1, House Bill No. 1, 29th Legislature, First Special Session, that was approved by the Governor on January 22, 1970 and filed with the Court on February 16, 1970, for the reason that it creates legislative districts that are grossly unequal and therefore denies to the people of this State their constitutional right to have their votes equally weighed. The plaintiff-intervenor is filing at this time, for the consideration of the Court during the hearing scheduled to commence on April 16, an alternative plan which does comply with the constitutional mandate that districts be as close to being equal as is practicable. He requests the Court to reject the recently enacted plan and to require the State to follow the plan which he is now presenting until such time as the State shall enact a constitutionally valid plan.

A DESCRIPTION OF THE PLAN ENACTED BY THE LEGISLATURE

The legislative districts defined in the Legislature's plan are groupings of the traditional political precincts. No one knows how many people live in any of these precincts, either now or at any prior time, so that this number must be estimated. The estimate used by the Legislature was based

entirely on voter registration figures. The number of people in a precinct is assumed to be that proportion of the county's 1960 population which the precinct's voted registration bears to the county's voter registration.

This sort of estimate of course is subject to a great margin of error. It is furthermore particularly evil in that the error is not random. In all cases the error will multiply the voting strength of the affluent and decimate the voting strength of the poor, the urban ethnic minorities, the agricultural farm workers and the American Indians.

The deviations among districts created by the Legislature are enormous. While we cannot in any case tell exactly how many people are in any of these districts, it can be estimated within reasonable bounds by counting the people within the census tracts that lie within the district. We can then estimate that there are about 70,000 people within the Phoenix inner city District 28, and about 45,000 people in the affluent northeastern Phoenix District 20. This is an astounding deviation range of about 25% above the norm of 56,300 to about 20% below that norm. This is not only a blatant deviation—it is also a blatant discrimination against poor people.

The intervenor-plaintiff asks the Court to reject the plan filed by the defendant.

A Description of Plaintiff-Intervenor's Plan

Plaintiff-intervenor's plan is based on a very simply principle. The only way to approach equality in the number of people in the legislative districts is to apportion the districts by population. Since we do not know how many people live in the traditional political precincts, those precincts serve no purpose and must be discarded. The only districts that we can validly resort to are the census enumeration districts and tracts. These are the building blocks of the districts in intervenor-plaintiff's plan.

The population figures used by intervenor-plaintiff were provided by the Employment Security Commission of Arizona. They are projections of the 1965 census figures as to 75% of the State's population that was counted in 1965, and of the 1960 figures as to the rest of the State's population. These projections are made by methods developed by the United States Census Bureau. An explanation of how these projections were made will be presented at the trial by the Employment Security Commission's census statistician, Mr. Jack Kronenfeld. It will be demonstrated beyond any reasonable doubt that the use of any figures other than these official census projections will yield deviations which are both gross and avoidable. There is one small but easily surmountable problem in developing a plan based on census enumeration districts. In a few cases the boundary lines do not appear on easily available maps. When this occurred the plaintiff-intervenor disregarded such line and used a nearby easily identifiable line that appears on the general highway map prepared by the Arizona State Highway Department. For example, where a curving line running east and west across central Yuma County did not appear on the highway map, intervenor-plaintiff substituted for such line the Gila and Salt River base line. In this and in every other case the number of people affected by substitution of lines is clearly negligible.

This plan creates 30 districts, one for each senator and two or three representatives. The number of people in each district should ideally be 56,300. The smallest district in this plan is District 9, which is the south half of Yuma County and which includes 55,065 people. The largest district is District 11, including Kingman and Prescott, which contains 57,223 people. The deviation from the norm in each direction is therefore about 2%. The intervenor-plaintiff could not, with the most diligent effort, reduce the deviation beyond this range.

The plan is presented in four maps: A State map, a Maricopa County map, and Phoenix and Tucson city maps.

arge, detailed maps are on file with the Clerk, and smaller pies are distributed with this Memorandum to the Judges d counsel.

Plaintiff-Intervenor requests the Court to order the de-ndant to use this proposed population plan in the 1970 ections. There is ample time for County Governments to tablish precincts and polling places before these elections.

Respectfully submitted,

/s/ PHILIP J. SHEA
Philip J. Shea
Attorney for Herbert L. Ely

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civil 5112 Phoenix

GARY PETER KLAHR, *Plaintiff*,

HERBERT L. ELY, individually and as Chairman of the Democratic Party of Arizona, *Intervenor-Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, et al., *Defendants*.

Third Supplemental Decree

The court having this day filed herein its Memorandum inion and Findings of Fact and Conclusions of Law, d good cause appearing therefor,

IT IS ORDERED, ADJUDGED, AND DECREED:

I

The reapportionment plan and the redistricting plan set th in the Findings, Conclusions, and Decree entered in s cause on February 2, 1966, though deemed constitu-

tionally valid when adopted, are presently unconstitutional; and the congressional districts, legislative districts, and legislative sub-districts set forth in said Findings, Conclusions, and Decree are presently unconstitutional.

II

Chapter I, Twenty-Ninth Legislature, State of Arizona, First Special Session (hereinafter "Chapter 1"), does not provide a constitutionally valid districting of the State of Arizona for the election of Arizona Members of the House of Representatives nor a constitutionally valid apportionment of the members of the Arizona Legislature; but because of the imminence of the 1970 Arizona elections, the court adopts for said elections the provisions of Chapter 1 to govern the selection of Arizona Members of Congress and members of the Legislature.

III

The Thirtieth Legislature, State of Arizona, shall consist of thirty (30) members of the senate and sixty (60) members of the house of representatives. The legislative districts of the Thirtieth Legislature shall be as set forth and described in Chapter 1, and at the Arizona elections held in 1970, one (1) senator and two (2) representatives shall be elected from each legislative district.

IV

The congressional districts from which [illegible] Members to the House of Representatives from Arizona shall be selected in 1970, to serve in the 92nd Congress of the United States, shall be as set out in Chapter 1.

V

The respective boards of supervisors of Arizona are authorized, until June 1, 1970, to adjust the boundaries of

precincts within a legislative district in order to provide convenient polling places for voters.

VI

Except to the extent they are inconsistent herewith, the terms and provisions of the decree entered herein on February 2, 1966, and the terms and provisions of the supplemental decrees entered on March 14, 1966, and December 5, 1966, respectively, shall remain in force and effect until the further order of this court.

VII

The court, having been advised that detailed population figures for the State of Arizona will be available from the official 1970 census by the summer of 1971, assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment for both houses of the Arizona Legislature and a valid plan of redistricting the congressional districts of Arizona. Upon failure of the Legislature so to do, any part to this action may apply to the court for appropriate relief.

VIII

This court retains jurisdiction of this cause to fully carry into effect the foregoing.

DATED: May 19, 1970.

/s/ WILBERT H. JERTBERG
United States Circuit Judge

/s/ JAMES A. WALSH
United States District Judge

/s/ WALTER E. CRAIG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civil 5112 Phoenix

GARY PETER KLAHR, *Plaintiff*,

HERBERT L. ELY, individually and as Chairman of the Democratic Party of Arizona, *Intervenor-Plaintiff*,

v.

JACK WILLIAMS, Governor of the State of Arizona, ET AL., *Defendants*.

Memorandum Opinion, Findings of Fact, and Conclusions of Law

(May 19, 1970)

Before: JERTBERG, Senior Circuit Judge, and District Judges WALSH and CRAIG

PER CURIAM

In early 1966, following the decisions of the Supreme Court of the United States in *Wesberry* v. *Sanders*, 376 U.S. 1, and *Reynolds* v. *Sims*, 377 U.S. 533, this court in this cause adjudged void and unconstitutional the Arizona statute (§ 16-727, A.R.S., 1956), districting the state for the election of representatives in the United States Congress and the constitutional and statutory provisions of the state then in effect with respect to the membership and apportionment of the Arizona Legislature. Finding, in addition, that the Legislature, although having ample opportunity, had failed to enact a valid provision for congressional redistricting and a valid reapportionment of its own membership, the court ordered into effect a redistricting of congressional districts and a reapportionment of both houses of the Arizona Legislature for the 1966 primary and general elections and for such further elections as might follow until the Legislature itself adopted different and valid plans for districting and reapportionment. *Klahr* v. *Goddard*, 250 F. Supp. 537; 254 F. Supp. 997.

In June, 1967, the Arizona Legislature chosen at the first elections held in conformity with this court's decree en-

ted legislation apportioning itself. However, when the gislation came before us in 1969, we held that the then wly rendered decisions of the Supreme Court in *Kirk-trick* v. *Preisler,* 394 U.S. 526, and *Wells* v. *Rockefeller,* 4 U.S. 542, required that we hold the legislation invalid. *lahr* v. *Williams,* 303 F. Supp. 224.

In January, 1970, the Legislature enacted Chapter 1, venty-Ninth Legislature, State of Arizona, First Special ssion, (hereinafter "Chapter 1"), a new effort by the gislature to apportion itself and to district the State Arizona for the election of congressional representatives. apter 1 was approved by the Governor on January 22, 70, and became effective on April 20, 1970. Following en-tment of Chapter 1, defendants petitioned us for a hear-g and asked that we determine that Chapter 1 accom-shed a valid redistricting of the state's congressional tricts and a valid reapportionment of the Arizona Leg-ature. A hearing was held on April 16 and 17, 1970, in ich all parties participated and were heard.

Plaintiff, Klahr, does not question the validity of Chap-r 1 insofar as it apportions the Arizona Legislature but contends that with respect to congressional redistricting e Legislature has not devised a constitutionally valid an because it was possible for the Legislature to have ade the three congressional districts more nearly equal population than it did in Chapter 1. Plaintiff asks an der of this court that, until a valid plan of redistricting is acted by the Legislature, the defendants conduct the 1970 d all subsequent primary and general elections for Mem-rs of the United States House of Representatives from izona in a manner whereby each person seeking such ice will run at large within the State of Arizona.

Intervenor-plaintiff, Ely, challenges the constitutionality Chapter 1 insofar as it provides for apportionment of e Legislature, contending that the legislative districts tablished by Chapter 1 were determined upon the erro-

neous assumption that population can validly be calculated from voter registration figures. He contends that, if Chapter 1 becomes operative, the result will be serious under-representation in the Legislature of certain areas of the state.

Intervenor-plaintiff has submitted to the court, and asks the court to place into effect, a plan devised by his counsel for apportionment of the Legislature on the basis of 1965 projections of 1960 and 1965 censuses. The projections or estimates of population are prepared by the staff of the Arizona Employment Security Commission, using procedures prescribed by the United States Bureau of the Census. The heart of the plan proposed by intervenor-plaintiff is the building of legislative districts from census divisions, enumeration districts, and tracts. At the hearing, intervenor-plaintiff introduced testimony and exhibits in support of his proposed plan, the exhibits consisting, *inter alia*, of population estimates broken down by census divisions, enumeration districts, and tracts; maps of Arizona county census divisions, enumeration districts, and tracts; boundary descriptions of the census divisions existing within Arizona counties; and vari-colored maps showing thirty legislative districts as proposed by intervenor-plaintiff. From what was presented to us, it is evident that counsel for intervenor-plaintiff expended a great deal of time, effort, and skill in preparing his plan. We can say that counsel was on the right track and that very likely a valid reapportionment plan could result from what counsel has in mind. However, we must hold that the plan is simply not complete and we could not adopt it. No written legal descriptions of the boundaries of the proposed legislative districts have been furnished to us, and from our study of the testimony and exhibits we are not certain that such descriptions can be derived from the census district and tract boundaries. Admittedly, there are population errors in a number of districts delineated in the plan as filed, and we are not certain that they would be cured by

adjustments which counsel suggested in the course of the trial could be made. At all events, before intervenor-plaintiff's plan could be placed into operation practically

. . . . . .

Under our 1966 decree, the congressional districts were established on the basis of 1960 population figures and they contain deviations from ideal district populations ranging from +7.8% to —6.3%, or a total deviation range of 14.1%. The decree also reapportioned the Arizona Legislature on the basis of 1960 population figures, setting up legislative districts with deviations from the ideal district population ranging from +15.5% to —6.5%, a deviation range of 22%. Further, the decree authorized and approved legislative sub-districts within Maricopa and Pima Counties which were proposed by the parties and were drawn upon the basis of 1964 voter registrations in the two counties. On such voter registration basis, the decree permits deviations from the ideal sub-district registration ranging from +5.66% to —8.87%, or a total range of 14.53%. It appears now that if the sub-districts are tested on the basis of their 1968 voter registration figures, the deviations from the ideal sub-district registration would range from —22.12% to +24.97%, or an expanse of 47.09%.

In light of the foregoing, we must conclude that, tested by *Kirkpatrick*, *Wells*, and *Burns*, supra, the present congressional districting and state legislative apportionment plan does not meet constitutional standards.

Turning now to Chapter 1, the Act provides that, commencing with the 30th Legislature, the Arizona Senate shall consist of thirty members and the Arizona House of Representatives shall consist of sixty members. For the 30th Legislature, and until changed by the Legislature, Chapter 1 provides that there will exist thirty legislative districts, each of which shall elect one senator and two representatives; and the legislative districts are described in Chapter

1 by numbered election precincts, or parts of such precincts, or by county names, or by both, as established on January 1, 1970. With respect to congressional districts, Chapter 1 provides that District No. 1 is comprised of specified legislative districts or parts of legislative districts within Maricopa County; District No. 2 is comprised of five Arizona Counties, viz: Cochise, Pima, Pinal, Santa Cruz, and Yuma; and District No. 3 is comprised of eight Arizona Counties, viz: Apache, Coconino, Gila, Graham, Greenlee, Mohave, Navajo, and Yavapai, plus the part of Maricopa County not included within District No. 1.

The evidence before us discloses that the legislative districts which the Arizona Legislature adopted in Chapter 1 were produced with the aid of computers. According to the testimony of the persons in charge of the computer process, criteria provided to them by certain members of the Legislature were built into the computer program which produced the legislative districts. From the testimony, the criteria, in the order of their importance, were: first, minimum population deviations from the district norm; second, legislator incumbency; third, compactness of the district; fourth, party strength in the district.

With respect to the population factor utilized in programming the computer, no attempt was made to use recent population estimates but the programmers devised a formula which is described as "converting 1968 voter registration to 1960 census on a proportionate basis". Use of the conversion formula seems to have been deemed proper because this court's 1966 decree permitted and provided for legislative sub-districts in Maricopa and Pima Counties drawn upon the basis of 1964 voter registration in those counties, rather than upon population. The population factor in each of the election precincts comprising part of a legislative district was obtained by instructing the computer to take the 1968 voter registration for the precinct and divide it by the 1968 voter registration for

the county in which the precinct was located, thereby obtaining the percentage of registered voters of the county residing within the precinct. The computer was then directed to multiply that percentage figure by the 1960 census for the county in which the precinct was located, thereby obtaining the population factor for the precinct. It is obvious, of course, that although the 1960 population enters into the conversion formula, the population figures produced for the respective precincts comprising the legislative districts do not truly represent the population within those precincts in either 1960 or 1968.

When translated, the criterion "legislator incumbency" is but a ground rule utilized in an effort to insure that no more than one incumbent senator and two incumbent representatives will reside within any legislative district produced by the computer.

With respect to the "party strength" criterion, it apparently operated thusly: If, in building a legislative district from precincts, the precincts first selected have a history of voting heavily for one particular political party, then in selecting additional precincts for the district preference is to be given to those precincts which have a like history. The theory, it seems, is that legislative districts should be either heavily Democratic or heavily Republican, and not closely balanced on party lines.

The legislative districts produced with the aid of the computer do have a remarkably small deviation from the ideal or the norm, ranging between one district with a +.81% deviation and a district with a —.99% deviation, or a total deviation range of 1.8%; and the deviations among the congressional districts established in Chapter 1 range from +1.47% to —1.41%. We cannot, however, hold the districting and apportionment constitutionally valid. As pointed out above, the figures produced by the conversion formula as population are not truly population figures and we cannot find that the distribution of Members of

Congress or legislators provided by Chapter 1 is not substantially different from that which would have resulted had a permissible population basis been used. Further, the incumbency factor has no place in any reapportionment or redistricting. "The goal of reapportionment . . . is just representation of the people, not the protection of incumbents in a legislative body.". *League of Nebraska Municipalities* v. *Marsh*, 242 F. Supp. 357, 360. In addition, we disapprove as inapposite the consideration of party strength as a factor in reapportionment or redistricting.

Having found wanting in constitutionality the districting and apportionment plans of both the court and the Legislature, we face the questions of what can and should be done by the court. The 1970 elections are close at hand. Nomination petitions are likely circulating at the present time; nomination papers and petitions may be filed as early as June 10, and they must be filed not later than July 10. As one of the experienced election officials stated during the hearing, election precincts and all other arrangements for the elections should be set up by June 1. The usual practice of allowing time for the Legislature to act, failing which the court will act, is out of the question. Further, because of the imminency of the Arizona elective process, judicial districting and apportionment, even if possible at all, cannot be accomplished without the court's judicial alteration of the statutory plan and scheduling for holding primary elections, a course which would involve serious risk of confusion and chaos.

A decree directing that in this year's elections the Arizona Members of Congress and the members of the Legislature be elected "at large" is a possible solution; but the ordeal involved in conducting elections in which ninety seats in the Legislature are in contest is so obvious and grave that we could justify requiring it only if we were convinced that the Legislature's failure to enact a valid and effective plan for districting and apportionment was

deliberate and inexcusable. However, it is not our belief that the failure to have presently for Arizona a valid and effective plan for redistricting and reapportionment is the result of obduracy on the part of the present Legislature. In truth, it appears that the lack of an official state census since 1960, accompanied by the large increase in population since 1960, has understandably left the Legislature uncertain as to how to arrive at a valid population basis for reapportionment and redistricting.

Presently, the decennial census is being taken in Arizona and we are informed that the detailed figures developed therefrom will be available in the summer of 1971. It does not appear reasonable to us to conclude that we are required to select either a precipitate venture into judicial districting and apportionment or an "at large" election, solely for the last elections that will be held before the 1970 census figures are available. We think that we may properly either order the 1970 elections of Arizona Members of Congress and members of the Legislature to be held in accordance with our 1966 decree or adopt the provisions of Chapter 1 as a temporary plan of redistricting and reapportionment to be in effect only for the 1970 elections.

We have studied both our decree and Chapter 1, and we have concluded that, of the two, Chapter 1 more nearly conforms with the mandate "one man, one vote", which derives from the Equal Protection Clause. Consequently, we will adopt the provisions of Chapter 1 to govern the elections of Arizona Members of Congress and members of the Legislature for the 1970 elections and enter a decree accordingly.

As mentioned earlier, plaintiff has asked that we order "at large" elections of Members of Congress this year. His request is based upon the fact that there is evidence before us that the Legislature could have reduced the range of deviations from the ideal among congressional

districts below the 2.9% which is produced by Chapter 1. In arguing plaintiff's request, counsel frankly stated that the idea of mandated "at large" elections was repugnant to him, as it is to us. Since the deviation range is relatively quite small, and since we are dealing with the last congressional elections before official census figures will be available, we deny the request notwithstanding "at large" congressional elections would not present the grave problems and difficulties inherent in "at large" elections of members of the Legislature.

Supreme Court of the United States

No. 548 ------, *October Term, 19* 70

Herbert L. Ely, Individually and as Chairman of the Democratic Party of Arizona,

Appellant,

v.

Gary Peter Klahr et al.

APPEAL from the United States District Court for the District of Arizona.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 21, 1970

FILE COPY

Supreme Court, U.S.
FILED
AUG 17 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 548

HERBERT L. ELY, INDIVIDUALLY AND AS CHAIRMAN OF THE DEMOCRATIC PARTY OF ARIZONA, APPELLANT,

v.

GARY PETER KLAHR, JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, AND WESLEY BOLIN, SECRETARY OF STATE OF ARIZONA, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

HERBERT L. ELY,
in propria persona,
904 Arizona Title Bldg.
Phoenix, Arizona

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

NO.

HERBERT L. ELY, INDIVIDUALLY AND AS CHAIRMAN OF THE DEMOCRATIC PARTY OF ARIZONA, APPELLANT,

v.

GARY PETER KLAHR, JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, AND WESLEY BOLIN, SECRETARY OF STATE OF ARIZONA, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Judgment and Decree of the United States District Court for the District of Arizona holding that both houses of the Arizona Legislature were unconstitutionally apportioned was filed on February 2, 1966 and was supplemented by a First Supplemental Decree filed on March 4, 1966, and by Second Supplemental Decree filed on December 5, 1966. These opinions appear at 250 F.Supp. 537, 254 F.Supp. 997 and 289 F.Supp. 827. Unpublished opinions were filed on July 22, 1969 and May 19, 1970, and these are attached to this Statement as Appendix A and Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

On January 22, 1970 the defendant Jack Williams, Governor of Arizona, approved Chapter 1, House Bill No. 1, 29th Arizona Legislature, First Special Session, which redistricted both houses of the Arizona Legislature essentially on the basis of voter registration rather than population. The date of this enactment was almost six years after suit was originally filed, during all of which time Arizona has been living with a substantially malapportioned Legislature. Since the District Court had had continuing jurisdiction over Arizona's legislative apportionment problem since the suit was filed, the Attorney General filed this new enactment with the Court on February 16, 1970 and requested that it be approved. The appellant challenged the statute on the grounds that it violated the Fourteenth Amendment to the United States Constitution. After a hearing on this plan, and on an alternative plan based on population rather than voter registration which was proposed by appellant, the Court held that House Bill No. 1 was

unconstitutional, but refused to enjoin its enforcement. Its decree, entered on May 19, 1970, was the denial of an injunction in a proceeding required to be determined by a district court of three judges.

Jurisdiction of the appeal is conferred on this Court by Title 28 U.S.C.A., Section 1253.

Cases believed to sustain the jurisdiction of this Court are:

Moore v. Ogilvie, 394 U.S. 814 (1969)

Kesler v. Department of Public Safety, Financial Responsibility Division, State of Utah, 369 U.S. 153 (1962)

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960)

Query v. United Ctates, 316 U.S. 486 (1942)

Interstate Busses Corporation v. Blodgett, 276 U.S. 245 (1928)

Palmetto Fire Insurance Co. v. Connecticut, 272 U.S. 295 (1926)

The Arizona statute which is claimed to be unconstitutional is Chapter 1, House Bill No. 1, 29th Legislature, First Special Session. A copy of this statute is attached to this Statement as Appendix C.

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal: Was it error for the United States District Court to refuse to enjoin the enforcement of an Arizona legislative reapportionment plan in which the legislative districts have approximately equal numbers of registered voters but grossly unequal numbers of people, on the grounds that such plan decimates the voting strength of the poor, the urban ethnic minorities, the

agricultural farm workers, and the American Indian, and denies them the equal protection of the laws.

STATEMENT OF THE CASE

Gary Peter Klahr filed a suit against the Governor and the Secretary of State of Arizona in the United States District Court on April 27, 1964, claiming that his rights under the Fourteenth Amendment were being abridged by Arizona laws governing the apportionment of the State Legislature. The suit also attacked the inequality of the Congressional Districts but that element of the case is not before this Court.

At the time this suit was filed the apportionment of the Arizona Senate and House of Representatives was determined by Art. 4, Pt. 2, § 1, of the Arizona Constitution. This provided that the Senate shall consist of 28 members, 2 from each of the State's fourteen Counties. It also provided for a House of Representatives comprised of 80 members apportioned every four years among the Counties in proportion to the number of votes cast in such Counties at the last prior gubernatorial election, except that each County would be entitled to not less than one representative. According to the 1960 census the population of the Counties ranged from 663,510 to 7,736. There have traditionally been great variations in the percentage of people in each County that vote, due largely to the fact that a few Counties contain large numbers of American Indians who do not participate in the electoral process.

The First Regular Session of the Twenty-Seventh Legislature that sat in 1965 did not enact a reapportionment plan and, after its adjournment, the Governor called a Special Session to sit during the summer of 1965 to deal exclusively with this problem. On May

18, 1965, the District Court, by minute entry, ordered that the pretrial hearing and trial be deferred until after the conclusion of the Special Session so that the Legislature would have a fair opportunity to right an obvious wrong. This Special Session yielded Senate Bill 11, which provided that eleven of the least populous Counties be allotted one Senate seat each and that multiple seats be allotted to the three most populous Counties. It did not undertake to reapportion the House.

After a trial commencing on November 18, 1965, the District Court held, by its decree filed on February 2, 1966: (1) that Senate Bill 11 was unconstitutional since the populations of Counties that were assigned one Senate seat ranged from 55,039 to 7,736; and (2) that Art. 4, Pt. 2, § 1, of the Arizona Constitution unconstitutionally apportioned the House of Representatives, citing as an example of malapportionment that a County with a population of 30,438 was entitled to one Representative whereas another County with a population of 28,912 was entitled to three Representatives. By that decree, together with a supplemental decree filed on March 4, 1966, the Court imposed on the State its own "temporary and provisional" reapportionment plan which created 30 legislative districts, each district to be represented by one Senator and two Representatives. Twenty-one of these districts, which were within the two most populated Counties, Maricopa and Pima, were apportioned on the basis of voter registration rather than population. The other nine districts were outlying Counties or groupings of two or three such Counties.

In June 1967, the Legislature, in its second effort to reapportion itself, enacted Chapter 1, 28th Legislature,

First Special Session. This measure was put to the voters in November, 1968, and, having received the support of a majority of those voting upon it, it was proclaimed into law by the Governor on January 17, 1969. It was upon the enactment of this statute by the Legislature that Richard Duffield, appellant's predecessor as Chairman of the Democratic Party of Arizona, petitioned for leave to intervene for the purpose of assuring that the measure would be vigorously challenged. This plan again apportioned legislative districts on the basis of voter registration and permitted a deviation from the norm of as much as 40% until 1971 and a deviation of as much as 16% thereafter. After a hearing commencing on January 17, 1969 the District Court, by Decision filed on July 22, 1969, held that these deviations were excessive and had not been justified. In its opinion it concluded, "there is ample time prior to the date that the machinery for conducting the 1970 elections must be set up, for the Arizona Legislature to meet its obligations."

The most recent effort by the Legislature to reapportion itself was Chapter 1, House Bill No. 1, 29th Legislature, First Special Session, that was approved by the Governor on January 22, 1970, and filed with the District Court on February 16, 1970. This plan, like that imposed by the Court, provides for 30 legislative districts, each to be represented by one senator and two representatives. Each district is a grouping of traditional political precincts. Since it is not known what the population of a precinct is, ,it is assumed to be that portion of its county's 1960 population which the voter registration in the precinct bears to the total voter registration of the county. Appellant's objection to this plan was that this gave rise to wide population deviations among the districts and these deviations

enhanced the political influence of the affluent and decimated the influence of the poor and members of the racial minorities. As an example, appellant showed (and it was not disputed) that in an affluent Phoenix district there were about 35,000 people and in the Phoenix district comprised primarily of negroes and Mexican-Americans there were more than 70,000 people. Appellant presented his own plan to the District Court in which the districts were comprised of groupings of census enumeration divisions and tracts using 1968 population projection figures prepared by the Arizona Employment Security Commission working in cooperation with the United States Census Bureau. This was the first plan presented to the Court which did not use voter registration as a significant factor in estimating population. After a hearing commencing on April 16, 1970, the Court, by its decree filed on May 19, 1970, held the new legislative plan to be unconstitutional but nevertheless approved its use. This decree further held that any party could petition for further relief on or after November 1, 1971, if the Legislature has not by then enacted a constitutionally valid plan.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The question presented in this appeal is indeed substantial and requires plenary consideration, with briefs on the merits and oral argument, for its resolution. Deprivations of voting rights in Arizona elections are far more grevious violations of the Equal Protection Clause than were those dealt with in *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969) and *Wells v. Rockefeller,* 394 U.S. 542 (1969). The legislative apportionment plan now in effect, based on voter registration, produces a distribution of legislators substantially dif-

ferent from that which would result from the use of a population plan. cf. *Burns v. Richardson,* 384 U.S. 73 (1966) And the people being deprived of equal voting rights are not a random cross-section of the population. They are rather the very people whose only capacity to exert peaceful and constructive influence in government is through the ballot-box. It is the Negro and Mexican-American district of Phoenix that includes more than 70,000 people, while a district comprised of their comfortable white neighbors on the other side of the tracks includes only about 35,000 people. And the American Indian population of Arizona suffers its traditional abuse under the current plan. The notorious fact is that Indians, who were excluded from participatory democracy before 1924 by being denied rights of citizenship, have in many areas not yet been brought into the political mainstream. This is particularly true of numerous Indians residing in a vast area of tribal lands in northeastern Arizona, included within Apache, Navajo and Coconino Counties. In fact the Bureau of the Census officially determined, pursuant to Section 4 of the Voting Rights Act of 1965 (79 Stat. 438, 42 U.S.C.A. § 1793) that less than 50% of the residents of those three Counties voted in the presidential election in 1964. 30 Fed. Reg. 9897, 14505; *Apache County v. United States,* 256 F.Supp. 903 (D. of C. 1966)

The sad fact is then that the substantial inequality of voting rights among Arizona citizens has ugly racial overtones. This is a wrong that should be corrected by the Court at the earliest time without waiting and waiting for the Legislature finally to do the right thing.

THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENJOIN THE OPERATION OF HOUSE BILL 1

The District Court has been nothing if not patient. Faced with a grossly malapportioned Legislature in April, 1964, when this suit was filed, the District Court on June 25, 1964, ordered all proceedings stayed until 30 days after the adjournment of the 1965 Regular Session of the Legislature. When that Session was over, and on May 18, 1965, the Court ordered a deferral of the pretrial and trial until after a Special Session that followed the Regular Session. This Special Session yielded only Senate Bill 11 which, coming after *Wesberry v. Sanders,* 376 U.S. 1 (1964), *Reynolds v. Sims,* 377 U.S. 533 (1964) and *Davis v. Mann,* 377 U.S. 678 (1964), was downright irresponsible.

The citizens of Arizona have since then had to live with the plan defined in the District Court decrees of February 2 and March 4, 1966, which, all parties agree, created districts with deviations in excess of 20%. During all this time the Legislature has demonstrated its persistent disinclination to allow one man-one vote in Arizona.

In *Reynolds v. Sims,* 377 U.S. at 585, this Court said:

> "It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan"

This Court went on to indicate that the principal factor justifying a court not taking such appropriate action was "an impending election." From that we infer that the District Court acted appropriately in permitting the election of 1964 to be held. But that was six years

ago and the only solace now offered is that we can petition the District Court for further relief on or after November 1, 1971, if the malapportioned Legislature has not by then done the right thing. This almost certainly means that we shall be in trial in 1972 with no more hope then than in 1970 of persuading the District Court to impose a plan that gives a full vote to all citizens.

Denial of injunctive relief by the District Court in its decree of May 19, 1970, coupled with its refusal to order a population apportionment plan, was an abuse of discretion that sorely prejudices the rights of minority groups in Arizona not only in 1970 but imminently in 1972.

THE NOTICE OF APPEAL

The decree of May 19, ,1970, was appealed by filing a Notice of Appeal on June 8, 1970, with the Clerk of the United States District Court for the District of Arizona. A copy of it was served on counsel of record for the other parties on June 18, 1970, in accordance with Rule 33, Supreme Court Rules. A copy of this Notice of Appeal is attached to this Statement as Appendix D.

Respectfully submitted,

HERBERT L. ELY, APPELLANT

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Cv. 5112-Phx.

GARY P. KLAHR, PLAINTIFF,

vs.

RICHARD DUFFIELD, INDIVIDUALLY, AND AS CHAIRMAN OF THE DEMOCRATIC PARTY OF ARIZONA, INTERVENOR-PLAINTIFF,

JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, ET AL., DEFENDANTS.

OPINION AND DECISION

Opinion Filed: July 22, 1969

Before: Jertberg, Senior Circuit Judge, and District Judges Walsh and Craig

PER CURIAM

The Arizona Legislature chosen at the 1966 state elections held in conformity with the decree of this court *(Klahr v. Goddard, Governer, etc.*, 250 F. Supp. 537; 254 F. Supp. 997), in June, 1967, enacted Chapter 1, Twenty-eighth Legislature, First Special Session, (hereinafter "Chapter 1"), apportioning both the Senate and the House of Tepresentatives of Arizona. Shortly thereafter, pleadings filed herein by the parties sought a determination by the court as to the validity of Chapter 1, plaintiff and defendants seeking a ruling

that the legislation is valid, and intervenor-plaintiff contending it must be held unconstitutional under the decisions of the United States Supreme Court relating to apportionment of state legislatures. When referendum petitions were filed against Chapter 1, so that it would not become law unless and until approved by a majority of the votes cast thereon at the 1968 general election, we deferred a hearing as to the validity of Chapter 1 until the time when, if ever, it became effective.

Chapter 1 received the support of the majority of those voting upon it at the 1968 general election and, the Governor of Arizona having thereafter proclaimed it in force and effect, on January 17, 1969, we held the deferred hearing.[1] On April 7, 1969, the Supreme Court of the United States decided *Kirkpatrick, Secretary of State of Missouri, et al., v. Preisler, et al.*, 394 U.S. 526, 22 L.Ed. 2d 519, 89 S.Ct. ....., and *Wells v. Rockefeller, as Governor, et al.*, 394 U.S. 542, 22 L.Ed. 2d 535, 89 S.Ct. ..... These decisions require that we hold Chapter 1 to be unconstitutional and invalid.

Chapter 1 provides that, beginning with the Twenty-ninth Arizona Legislature, the State of Arizona is divided into seven election districts; and the election districts are subdivided into legislative districts, from each of which there will be elected one senator and two

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[1] The membership of the court at the time of the hearing comprised the late Senior Circuit Judge Walter L. Pope and District Judges Walsh and Craig. Judge Pope died on March 27, 1969. The court was reconstituted on April 3, 1969, with Senior Circuit Judge Gilbert H. Jertberg and District Judges Walsh and Craig as members.

representatives. The plan of Chapter 1 is for the entire membership of the legislature to be apportioned among the election districts on the basis of population; but Chapter 1 provides, further, that the number of legislators apportioned to each election district shall be apportioned among its legislative districts on the basis of voter registration. With respect to election districts, Chapter 1 permits until 1971 a deviation from the ideal population per district of as much as 15%;[2] and in 1971 and thereafter, a deviation from the ideal population per district of 16%, plus or minus, is allowable. With respect to legislative districts, Chapter 1 permits until 1971 a deviation from the ideal voter registration per district of as much as 40%;[3] and in 1971 and thereafter, a deviation from the ideal voter registration per district of 16%, plus or minus, is allowable.

It is quite evident that the Legislature in enacting Chapter 1 had the belief that a population variance among election districts of not more than 16%, plus or minus, from the ideal election district population satisfied the constitutional requirements for valid apportionment of such districts.[4] It is evident, too,

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[2] The most populous election district may be approximately 8.6% above the mathematical ideal and the least populous district approximately 15.1% below.

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[3] This is on the basis of voter registration figures for the 1966 General Election. The legislative district containing the greatest number of registered voters may be approximately 24.26% above the mathematical ideal and the legislative district containing the smallest number of registered voters approximately 40% below.

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[4] At the time Chapter 1 was enacted by the Legislature, the case reports and legal literature with respect to redistricting and reapportionment furnished some apparent justification for this belief.

that with respect to legislative districts the legislature assumed that a like percentage variance of registered voters among legislative districts was permissible. But *Kirkpatrick* and *Wells* hold that the establishment by a state legislature of a fixed percentage population variance which the legislature will consider *de minimis* is inconsistent with and will not satisfy the constitutional requirements that states make their Congressional districts and their state legislative districts as nearly of equal population "as is practicable".[5] *Wesberry v. Sanders,* 376 U.S. 1, 18, 11 L.Ed. 2d 481, 492, 83 S.Ct. 1691; *Reynolds v. Sims,* 377 U.S. 533, 577, 12 L.Ed. 2d 506, 536, 84 S.Ct. 1362. *Kirkpatrick* held, further, that even if the court were to assume that apportionment might be based upon eligible voter population rather than total population,[6] the districts must be as nearly of equal eligible voter population as is practicable.

Nothing presented to the court upon the hearing would permit us to hold that the Legislature could not come any closer than it did in Chapter 1 to achieve population equality among the districts from which its senators and representatives are to be elected. To the contrary, it appears plain that the Legislature assumed

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[5] The redistricting of Congressional districts found invalid in *Kirkpatrick* had resulted in maximum variations from ideal population of from plus 3.13% to minus 2.84%. In *Wells,* the variations ranged from plus 6.4888% to minus 6.608%.

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[6] Though the court did make this assumption, it expressed the caveat that there may be a question as to whether apportionment on a basis other than total population can ever be permissable. 394 U.S. 534. In Arizona, the evidence suggests rather strongly that apportionment on the basis of registered voters would result in under-representation of the people in Apache and Navajo Counties (R.T., pp. 187, et seq.).

that so long as its reapportionment plan kept all election district deviations from ideal population within 16%, plus or minus, the constitutional tests for a valid apportionment were met. No evidence was presented which would justify either the population variance among the election districts or the registered voter variance among the legislative districts. We hold, therefore, that Chapter 1 is invalid for failing to meet the constitutional requirement of equal representation for equal numbers of people as nearly as is practicable.

Having held that Chapter 1 is invalid, it results that the decree and supplemental decrees heretofore entered in this case redistricting the Congressional Districts of Arizona and reapportioning both Houses of the Arizona Legislature govern primary, general, and special elections which may be held hereafter until the Legislature shall have adopted different, valid, and effective plans for redistricting and reapportionment, or until the further order of the court. However, while agreeing that Chapter 1 is invalid, plaintiff Klahr points out that the population variances among the Arizona Congressional districts, as established by this court's decree, are inconsistent with the rule established in *Kirkpatrick*,[7] and he asks that we forthwith order defendants to conduct the 1970 and all subsequent primary and general elections for the offices of Representatives in Congress, State Senator, and State Representative in a manner whereby the candidates for such offices will "run at large" within the State of Arizona. Since we are cognizant of the fact that re-

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[7] Apparently, population variances in reapportionments accomplished by court decree on an emergency basis may be permissible when the same variances would invalidate a legislative reapportionment. *Kirkpatrick*, 394 U.S. 532, fn. 2.

districting and reapportioning are the constitutional duty of the Legislature and not that of this court, we decline to enter such an order at this time. *Kirkpatrick* and *Wells* have now expounded what is required of a legislature if its redistricting and reapportioning work is to be constitutionally acceptable. There is ample time prior to the date that the machinery for conducting the 1970 elections must be set up for the Arizona Legislature to meet its obligation. If it fails, plaintiff may renew his request for relief, since the same will be within our continuing jurisdiction.

DATED: July 22, 1969.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civil 5112 Phoenix

MEMORANDUM OPINION, FINDINGS OF FACT,
AND CONCLUSIONS OF LAW
May 19, 1970

GARY PETER KLAHR, PLAINTIFF,

HERBERT L. ELY, INDIVIDUALLY AND AS CHAIRMAN OF THE DEMOCRATIC PATY OF ARIZONA, INTERVENOR-PLAINTIFF,

vs.

JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, ET AL., DEFENDANTS.

Before: Jertberg, Senior Circuit Judge, and District Judges Walsh and Craig

PER CURIAM

In early 1966, following the decisions of the Supreme Court of the United States in *Wesberry v. Sanders,* 376 U.S. 1, and *Reynolds v. Sims,* 377 U.S. 533, this court in this cause adjudged void and unconstitutional the Arizona statute (§ 16-727, A.R.S., 1956), districting the state for the election of representatives in the United States Congress and the constitutional and

statutory provisions of the state then in effect with respect to the membership and apportionment of the Arizona Legislature. Finding, in addition, that the Legislature, although having ample opportunity, had failed to enact a valid provision for congressional redistricting and a valid reapportionment of its own membership, the court ordered into effect a redistricting of congressional districts and a reapportionment of both houses of the Arizona Legislature for the 1966 primary and general elections and for such further elections as might follow until the Legislature itself adopted different and valid plans for districting and reapportionment. *Klahr v. Goddard,* 250 F. Supp. 537; 254 F. Supp. 997.

In June, 1967, the Arizona Legislature chosen at the first elections held in conformity with this court's decree enacted legislation apportioning itself. However, when the legislation came before us in 1969, we held that the then newly rendered decisions of the Supreme Court in *Kirkpatrick v. Preisler,* 394 U.S. 526, and *Wells v. Rockefeller,* 394 U.S. 542, required that we hold the legislation invalid. *Klahr v. Williams,* 303 F. Supp. 224.

In January, 1970, the Legislature enacted Chapter 1, Twenty-Ninth Legislature, State of Arizona, First Special Session, (hereinafter "Chapter 1"), ,a new effort by the Legislature to apportion itself and to district the State of Arizona for the election of congressional representatives. Chapter 1 was approved by the Governor on January 22, ,1970, and became effective on April 20, 1970. Following enactment of Chapter 1, defendants petitioned us for a hearing and asked that we determine that Chapter 1 accomplished a valid redistricting of the state's congressional districts and

a valid reapportionment of the Arizona Legislature. A hearing was held on April 16 and 17, 1970, in which all parties participated and were heard.

Plaintiff, Klahr, does not question the validity of Chapter 1 insofar as it apportions the Arizona Legislature but he contends that with respect to congressional redistricting the Legislature has not devised a constitutionally valid plan because it was possible for the Legislature to have made the three congressional districts more nearly equal in population than it did in Chapter 1. Plaintiff asks an order of this court that, until a valid plan of redistricting is enacted by the Legislature, the defendants conduct the 1970 and all subsequent primary and general elections for Members of the United States House of Representatives from Arizona in a manner whereby each person seeking such office will run at large within the State of Arizona.

Intervenor-plaintiff, Ely, challenges the constitutionality of Chapter 1 insofar as it provides for apportionment of the Legislature, contending that the legislative districts established by Chapter 1 were determined upon the erroneous assumption that population can validly be calculated from voter registration figures. He contends that, if Chapter 1 becomes operative, the result will be serious under-representation in the Legislature of certain areas of the state.

Intervenor-plaintiff has submitted to the court, and asks the court to place into effect, a plan devised by his counsel for apportionment of the Legislature on the basis of 1968 projections of 1960 and 1965 Arizona censuses. The projections or estimates of population are prepared by the staff of the Arizona Employment Security Commission, using procedures prescribed by the United States Bureau of the Census. The heart of

the plan sponsored by intervenor-plaintiff is the building of legislative districts from census divisions, enumeration districts, and tracts. At the hearing, intervenor-plaintiff introduced testimony consisting, *inter alia,* of population estimates broken down by census divisions, enumeration districts, and tracts; maps of Arizona county census divisions, enumeration districts, and tracts; boundary descriptions of the census divisions existing within Arizona counties; and vari-colored maps showing thirty legislative districts as proposed by intervenor-plaintiff. From what was presented to us, it is evident that counsel for intervenor-plaintiff expended a great deal of time, effort, and skill in preparing his plan. We can say that counsel was on the right track and that very likely a valid reapportionment plan could result from what counsel has in mind. However, we must hold that the plan is simply not complete and we could not adopt it. No written legal descriptions of the boundaries of the proposed legislative districts have been furnished to us, and from our study of the testimony and exhibits we are not certain that such descriptions can be derived from the census district and tract boundaries. Admittedly, there are population errors in a number of districts delineated in the plan as filed, and we are not certain that they would be cured by adjustments which counsel suggested in the course of the trial could be made. At all events, before intervenor-plaintiff's plan could be placed into operation practically every election precinct in the State of Arizona would have to be reestablished, since the plan disregards election precinct boundaries entirely. The 1970 election process begins in Arizona in early June and we are certain that, even if we had the complete cooperation of the election officials of the fourteen Arizona counties, the necessary

reconstruction of the election precincts could not be accomplished in time.

Before proceeding to a consideration of Chapter 1, we feel it is in order to examine and discuss the redistricting and reapportionment plan which this court adopted in 1966 and which has been in effect from that date up to the present. When this court entered its decree, it was done in the belief that rather substantial population deviations among congressional districts and state legislative districts were constitutionally permissible and that, with respect to sub-districts of state legislative districts, voter registration figures might be constitutionally substituted for population figures. Later decisions of the United States Supreme Court, however, have established that population deviations deemed to be constitutional in our 1966 decree would now exceed constitutional standards, *Kirkpatricy v. Preisler,* supra; *Wells v. Rockefeller,* supra; and it is clear now, also, that apportionment of members of a legislature on the basis of voter registration satisfies the Equal Protection Clause only if it produces a distribution of legislators not substantially different from that which would have resulted had a permissible population basis been used. *Burns v. Richardson,* 384 U.S. 73, 93.

Under our 1966 decree, the congressional districts were established on the basis of 1960 population figures and they contain deviations from ideal district populations ranging from plus 7.8% to minus 6.3%, or a total deviation range of 14.1%. The decree also reapportioned the Arizona Legislature on the basis of 1960 population figures, setting up legislative districts with deviations from the ideal district population ranging from plus 15.5% to minus 6.5%, a deviation range of

22%. Further, the decree authorized and approved legislative sub-districts within Maricopa and Pima Counties which were proposed by the parties and were drawn upon the basis of 1964 voter registrations in the decree permits deviations from the ideal sub-district two counties. On such voter registration basis, the registration ranging from plus 5.66% to minus 8.87%, or a total range of 14.53%. It appears now that if the sub-districts are tested on the basis of their 1968 voter registration figures, the deviations from the ideal sub-district registration would range from minus 22.12% to plus 24.97%, or an expanse of 47.09%.

In light of the foregoing, we must conclude that, tested by *Kirkpatrick, Wells,* and *Burns,* supra, the present congressional districting and state legislative apportionment plan does not meet constitutional standards.

Turning now to Chapter 1, the Act provides that, commencing with the 30th Legislature, the Arizona Senate shall consist of thirty members and the Arizona House of Representatives shall consist of sixty members. For the 30th Legislature, and until changed by the Legislature, Chapter 1 provides that there will exist thirty legislative districts, each of which shall elect one senator and two representatives; and the legislative districts are described in Chapter 1 by numbered election precincts, or parts of such precincts, or by county names, or by both, as established on January 1, 1970. With respect to congressional districts, Chapter 1 provides that District No. 1 is comprised of specified legislative districts or parts of legislative districts within Maricopa County; District No. 2 is comprised of five Arizona Counties, viz: Cochise, Pima, Pinal, Santa Cruz, and Yuma; and District No.

3 is comprised of eight Arizona Counties ,viz: Apache, Coconino, Gila, Graham, Greelee, Mohave, Navajo, and Yavapai, plus the part of Maricopa County not included within District No. 1.

The evidence before us discloses that the legislattive districts which the Arizona Legislature adopted in Chapter 1 were produced with the aid of computers. According to the testimony of the persons in charge of the computer process, criteria provided to them by certain members of the Legislature were built into the computer program which produced the legislative districts. From the testimony, the criteria, in the order of their importance, were: first, minimum population deviations from the district norm; second, legislator incumbency; third, compactness of the district; fourth, party strength in the district.

With respect to the population factor utilized in programming the computer, no attempt was made to use recent population estimates but the programmers devised a formula which is described as "converting 1968 voter registration to 1960 census on a proportionate basis". Use of the conversion formula seems to have been deemed proper because this court's 1966 decree permitted and provided for legislative subdistricts in Maricopa and Pima Counties drawn upon the basis of 1964 voter registration in those counties, rather than upon population. The population factor in each of the election precincts comprising part of a legislative district was obtained by instructing the computer to take the 1968 voter registration for the precinct and divide it by the 1968 voter registration for the county in which the precinct was located, thereby obtaining the percentage of registered voters by the county residing within the precinct. The computer

was then directed to multiply that percentage figure by the 1960 census for the county in which the precinct was located, thereby obtaining the population factor for the precinct. It is obvious, of course, that although the 1960 population enters into the conversion formula, the population figures produced for the respective precincts comprising the legislative districts do not truly represent the population within those precincts in either 1960 or 1968.

When translated, the criterion "legislator incumbency" is but a ground rule utilized in an effort to insure that no more than one incumbent senator and two incumbent representatives will reside within any legislative district produced by the computer.

With respect to the "party strength" criterion, it apparently operated thusly: If, in building a legislative district from precincts, the precincts first selected have a history of voting heavily for one particular political party, then in selecting additional precincts for the district preference is to be given to those precincts which have a like history. The theory, it seems, is that legislative districts should be either heavily Democratic or heavily Republican, and not closely balanced on party lines.

The legislative districts produced with the aid of the computer do have a remarkably small deviation from the ideal or the norm, ranging between one district with a plus .81% deviation and a district with a minus .99% deviation, or a total deviation range of 1.8%; and the deviations among the congressional districts established in Chapter 1 range from plus 1.47% to minus 1.41%. We cannot, however, hold the districting and apportionment constitutionally valid. As pointed out above, the figures produced by the con-

rsion formula as population are not truly population gures and we cannot find that the distribution of embers of Congress or legislators provided by Chapr 1 is not substantially different from that which ould have resulted had a permissible population basis en used. Further, the incumbency factor has no place any reapportionment or redistricting. "The goal reapportionment . . . is just representation of the eople, not the protection of incumbents in a legistive body." *League of Nebraska Municipalities v. arsh,* 242 F. Supp, 357, 360. In addition, we disapove as inapposite the consideration of party strength a factor in reapportionment or redistricting.

Having found wanting in constitutionality the disicting and apportionment plans of both the court and e Legislature, we face the questions of what can and ould be done by the court. The 1970 elections are ose at hand. Nomination petitions are likely circulatg at the present time; nomination papers and petions may be filed as early as June 10, and they must be led not later than July 10. As one of the experienced lection officials stated during the hearing, election recincts and all other arrangements for the elections hould be set up by June 1. The usual practice of llowing time for the Legislature to act, failing which he court will act, is out of the question. Further, beause of the imminency of the Arizona elective process, udicial districting and apportionment, even if possible t all, cannot be accomplished without the court's udicial alteration of the statutory plan and scheduling or holding primary elections, a course which would nvolve serious risk of confusion and chaos.

A decree directing that in this year's elections the Arizona Members of Congress and the members of the

Legislature be elected "at large" is a possible solution; but the ordeal involved in conducting elections in which ninety seats in the Legislature are in contest is so obvious and grave that we could justify requiring it only if we were convinced that the Legislature's failure to enact a valid and effective plan for districting and apportionment was deliberate and inexcusable. However, it is not our belief that the failure to have presently for Arizona a valid and effective plan for redistricting and reapportionment is the result of obduracy on the part of the present Legislature. In truth, it appears that the lack of an official state census since 1960, accompanied by the large increase in population since 1960, has understandably left the Legislature uncertain as to how to arrive at a valid population basis for reapportionment and redistricting.

Presently, the decennial census is being taken in Arizona and we are informed that the detailed figures developed therefrom will be available in the summer of 1971. It does not appear reasonable to us to conclude ture into judicial districting and apportionment or an that we are required to select either a precipitate ven- "at large" election, solely for the last elections that will be held before the 1970 census figures are available. We think that we may properly either order the 1970 elections of Arizona Members of Congress and members of the Legislature to be heled in accordance with our 1966 decree or adopt the provisions of Chapter 1 as a temporary plan of redistricting and reapportionment to be in effect only for the 1970 elections.

We have studied both our decree and Chapter 1, and we have concluded that, of the two, Chapter 1 more nearly conforms with the mandate "one man, one vote", which derives from the Equal Protection Clause.

Consequently, we will adopt the provisions of Chapter 1 to govern the elections of Arizona Members of Congress and members of the Legislature for the 1970 elections and enter a decree accordingly.

As mentioned earlier, plaintiff has asked that we order "at large" elections of Members of Congress this year. His request is based upon the fact that there is evidence before us that the Legislature could have reduced the range of deviations from the ideal among congressional districts below the 2.9% which is produced by Chapter 1. In arguing plaintiff's request, counsel frankly stated that the idea of mandated "at large" elections was repugnant to him, as it is to us. Since the deviation range is relatively quite small, and since we are dealing with the last congressional elections before official census figures will be available, we deny the request notwithstanding "at large" congressional elections would not present the grave problems and difficulties inherent in "at large" elections of members of the Legislature.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civil 5112 Phoenix

THIRD SUPPLEMENTAL DECREE

GARY PETER KLAHR, PLAINTIFF,

HERBERT L. ELY, INDIVIDUALLY AND AS CHAIRMAN OF THE DEMOCRATIC PARTY OF ARIZONA, INTERVENOR-PLAINTIFF,

vs.

JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, ET AL., DEFENDANTS.

Opinion Filed: May 19, 1970

The court having this day filed herein its Memorandum Opinion and Findings of Fact and Conclusions of Law, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED, AND DECREED:

I

The reapportionment plan and the redistricting plan set forth in the Findings, Conclusions, and Decree entered in this cause on February 2, 1966, though deemed constitutionally valid when adopted, are presently unconstitutional; and the congressional districts, legislative districts, and legislative sub-districts set forth in said Findings, Conclusions, and Decree are presently unconstitutional.

II

Chapter I, Twenty-Ninth Legislature, State of Arizona, First Special Session (hereinafter "Chapter 1"), does not provide a constitutionally valid districting of the State of Arizona for the election of Arizona Members of the House of Tepresentatives nor a constitutionally valid apportionment of the members of the Arizona Legislature; but because of the imminence of the 1970 Arizona elections, the court adopts for said elections the provisions of Chapter 1 to govern the selection of Arizona Members of Congress and members of the Legislature.

III

The Thirtieth Legislature, State of Arizona, shall consist of thirty (30) members of the senate and sixty (60) members of the house of representatives. The legislative districts of the Thirtieth Legislature shall be as set forth and described in Chaper 1, and at the Arizona elections held in 1970, one (1) senator and two (2) representatives shall be elected from each legislative district.

IV

The congressional districts from which the Members to the House of Representatives from Arizona shall be selected in 1970, to serve in the 92nd Congress of the United States, shall be as set out in Chapter 1.

V

The respective boards of supervisors of Arizona are authorized, until June 1, 1970, to adjust the boundaries of precincts within a legislative district in order to provide convenient polling places for voters.

VI

Except to the extent they are inconsistent herewith, the terms and provisions of the decree enterd herein on February 2, 1966, and the terms and provisions of the supplemental decrees entered on March 14, 1966, and December 5, 1966, respectively, shall remain in force and effect until the further order of this court.

VII

The court, having been advised that detailed population figures for the State of Arizona will be available from the official 1970 census by the summer of 1971, assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment for both houses of the Arizona Legislature and a valid plan of redistricting the congressional districts of Arizona. Upon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief.

VIII

This court retains jurisdiction of this cause to fully carry into effect the foregoing.

DATED: May 19, 1970.

GILBERT H. JERTBERG
United States Circuit Judge

JAMES A. WALSH
United States District Judge

WALTER E. CRAIG
United States District Judge

APPENDIX C

CHAPTER 1, HOUSE BILL NO. 1, 29TH LEGISLATURE, FIRST SPECIAL SESSION, REPEALED TITLE 16, CHAPTER 11, ARIZONA REVISED STATUTES AND ADDED A NEW TITLE 16, CHAPTER 11, CONSISTING OF SECTIONS 16-1401, 16-1402 AND 16-1403. THE FIRST TWO SECTIONS, DEALING WITH LEGISLATIVE REAPPORTIONMENT, ARE AS FOLLOWS:

CHAPTER 11

MEMBERSHIP AND APPORTIONMENT OF LEGISLATURE AND ESTABLISHMENT OF CONGRESSIONAL DISTRICTS

ARTICLE 1. IN GENERAL

16-1401. MEMBERSHIP OF LEGISLATURE

Commencing with the thirtieth legislature, the senate shall consist of thirty members and the house of represenatives of sixty members.

16-1402. LEGISLATIVE DISTRICTS

A. For the thirtieth legislature and until changed by the legislature, the legislative districts shall be established as provided in this section.

B. The legislative districts shall consist of geographic areas, and one senator and two representatives shall be elected from each slch district. These areas, described by the precinct or a part of such precinct as herein described, or county names or numbers, or both, as established on January 1, 1970, are set forth as follows:

DISTRICTS	DESCRIPTION
1	Maricopa county Aguila, New River, Wickenburg No. 1, Wickenburg No. 2. Mohave county Alamo, Bullhead, Chloride, Country Club, Davis Dam, Dolon Springs, Hackberry, Hilltop, ,Hualapai, North Kingman, South Kingman, East Kingman No. 1, East Kingman No. 2, West Kingman, Lake Havasu, Logasville, Mohave Valley, Oatman, Peach Springs, Riviera, Topock, Wikieup, Yucca. Yavapai county Bagdad, Beaver Creek, Bumblebee, Camp Verde, Camp Wood, Canyon, Castle Hot Springs, Cherry Creek, Childs, Chino Valley, Clarkdale, Cleator, Congress, Constellation, Cottonwood No. 1, Cottonwood No. 2, Crown King, Groom Creek, Hillside, Humbolt, Jerome, Kirkland, Mayer, Miller Valley East, Miller Valley West, Oak Creek, Prescott Northeast, Prescott Northwest, South Prescott Southwest, Red Rock, Tin-Prescott North, Prescott West, Prescott con, Skull Valley, Wagoner, Walnut Creek, Walnut Grove, Whipple, Yarnell. Yuma county Bouse, Parker No. 1, Parker No. 2, Wenden.
2	All of Coconino county. Mohave county Cane Beds, Colorado City, Littlefield, Moccasin, Mount Trumbull

DISTRICTS	DESCRIPTION
	Yavapai county Ash Fork, Seligman
3	Apache county Chinle, Teec Nos Pos
	Gila county Globe No. 9, Globe No. 10, Gisela, Payson No. 1, Payson No. 2,, Pine, Young.
	Graham county Bylas No. 13 Winslow No. 1, Winslow No. 2, Winslow No. 3, Winslow No. 4, Winslow No. 5, Winslow No. 6 Winslow No. 7, Winslow No. 8, Oraibi, Polacca, Tees To, Toreva, Holbrook No. 1, Holbrook No. 2, Holbrook No. 3, Holbrook No. 4, Indian Wells, Joseph City, Kayenta, Keams Canyon, Pinon, Woodruff, Snowflake No. 1, Snowflake No. 2, Taylor, Showlow No. 1, Showlow No. 2, Whiteriver, Cibecue, Heber, Overgaard, Clay Springs, Pinedale, Linden,
4	Apache county Alpine, Concho, Eager, Ft. Defiance, Ganado, Greer, Lukachukai, Lupton, McNary, Nutrioso, Puerco, Springerville, St. Johns, St. Michaels, Vernon, Wide Ruins,
	Graham county Solomon No. 1
	All of Greenlee county
	Navajo county Pinetop, Lakeside

DISTRICTS	DESCRIPTION
5	Maricopa county Gila Bend Yuma county Yuma No. 2, Yuma No. 3, Yuma No. 4, Yuma No. 5, Yuma No. 6, Yuma No. 7, Yuma No. 8, Yuma No. 9, Yuma No. 10, Yuma No. 11, Yuma No. 12, Yuma No. 13, Yuma No. 14, Yuma No. 15, Yuma No. 16, Yuma No. 17, Yuma No. 18, Yuma No. 19, Yuma No. 20, Yuma No. 21, Yuma No. 22, Cibola, Crane No. 1, Crane No. 2, Eehrenberg, Gadsden, Hyder, Laguna, Mohawk, Parker No. 3, Quartzite, Roll, Rood, Salome, Somerton No. 1, Somerton No. 2, Vicksburg, Wellton
6	Maricopa county Desert Baths, Dreamland, Jefferson, Oasis, Velda Rose
6	Pinal county Casa Grande No. 3, Queen Creek No. 4, Casa Grande No. 7, Eloy No. 9, Coolidge No. 11, Maricopa No. 13, Coolidge No. 15, Sacaton No. 16, Stanfield No. 18, Picacho No. 19, Apache Junction No. 20, Eloy No. 21, Casa Grande No. 22, Casa Grande No. 23, Coolidge No. 24, Coolidge No. 26, Casa Grande No. 31, Casa Grande No. 32, Eloy No. 33, Apache Junction No. 35, Arizona City No. 38
7	Gila county Globe No. 1, Globe No. 2, Globe No. 3, Globe No. 4, Globe No. 5, Globe No. 6, Globe No. 7, Globe No. 8, Globe No. 11, Miami No. 1,

ISTRICTS	DESCRIPTION
	Miami No. 3, Miami No. 4, Miami No. 5, Claypool No. 1, Claypool No. 2, Claypool No. 3, Central Heights, Hayden No. 1, Basin
	Winkleman, Christmas, Roosevelt, Tonto
	Pinal county
	Florence No. 1, Superior No. 2, Superior No. 6, Oracle No. 8, Red Rock No. 10, Ray No. 12,, Florence No. 14, Kearney No. 17, San Manuel No. 25, San Manuel No. 27, Kearney No. 28, Florence No. 34, Apache Junction No. 36, Superior No. 37, Superior No. 41, Superior No. 42.
8	Cochise county
	Benson No. 1, Benson No. 2, Bowie, Cochise, Douglas No. 1, Douglas No. 2, Douglas No. 3, Douglas No. 4, Douglas No. 5, Douglas No. 6, Douglas No. 7, Douglas No. 8, Douglas No. 9, Douglas No. 10, Dragoon, El Dorado, Lusk, McNeal, Paradise, Pearce, Pirtleville, Pomerene, San Simon, Tombstone, Webb, Whiteriver, Willcox No. 1, Willcox No. 2, Willcox No. 3.
	Graham county
	Safford No. 2, Safford No. 3, Layton No. 4, Layton No. 5, Thatcher No. 6, Thatcher No. 7, Central No. 8, Pima No. 9, Eden No. 10, Ft. Thomas No. 11, Geronimo No. 12, Klondyke No. 14, Bonita No. 15.
	Pinal county
	Mammoth No. 5, Feldman No. 39.
9	Cochise county
	Ash, Bisbee No. 1, Bisbee No. 2, Bisbee No.

DISTRICTS	DESCRIPTION
	3, Bisbee No. 4, Buena No. 1, Buena No. 2, Buena No. 3, Buena No. 4, Central Bridge, Don Luis, Hereford, Huachuca, Lowel No. 1, Lowell No. 2, Lowell No. 3, Naco, San Tafael, St. David, Darren No. 1, Warren No. 2, Warren No. 3, Warren No. 4
	Pima county No. 29, No. 30, No. 39, No. 43, No. 131
	All of Santa Cruz county
10	Pima county No. 1, No. 2, No. 3, No. 4, No. 5, No. 10, No. 13, No. 27, No. 34, No. 35, No. 36, No. 37, No. 38, No. 55, No. 57, No. 59, No. 60, No. 61, No. 63, No. 65, No. 104, No. 107, No. 108, No. 109, No. 112, No. 128, No. 130, No. 135. Yuma county Aztec.
11	Pima county No. 6, No. 7, No. 8, No. 9, No. 11 No. 12, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21, No. 22, No. 28, No. 41, No. 46, No. 58, No. 62, No. 64, No. 66, No. 78, No. 105, No. 110, No. 111, No. 139, No. 143.
12	Pima county No. 33, No. 40, No. 44, No. 67, No. 68, No. 69, No. 70, No. 75, No. 76, No. 97, No. 99, No. 100, No. 101, No. 102, No. 103, No. 118, No. 119, No. 122, No. 129, No. 132, No. 134, No. 138, No. 146.
13	Pima county No. 23, No. 24, No. 31, No. 45, No. 47, No. 48, No. 49, No. 50, No. 81, No. 82, No. 84, No. 85,

DISTRICTS	DESCRIPTION
	No. 86, No. 87, No. 88, No. 106, No. 113, No. 125, No. 136, No. 137.
14	Pima county No. 25, No. 26, No. 32, No. 51, No. 52, No. 53, No. 54, No. 71, No. 80, No. 89, No. 90, No. 91, No. 95, No. 96, No. 98, No. 114, No. 116, No. 120, No. 124, No. 126
15	Pima county No. 42, No. 56, No. 72, No. 73, No. 74, No. 77, No. 78, No. 83, No. 92, No. 93, No. 94, No. 115, No. 117, No. 121, No. 123, No. 127, No. 133, No. 140, No. 141, No. 142, No. 144, No. 145
16	Maricopa county Arlington, Buckeye No. 1, Buckeye No. 2, Dysart, Earll, Glendale No. 1, Glendale No. 2, Glendale No. 3, Glendale No. 4, Glendale No. 6, Glendale No. 7, Glendale No. 8, Highland, Harquahala, Holiday Gardens, Holiday Park, ndianola, Lexington, Liberty, Litchfield, Morristown, Orme, Salem, Starlight, St. Christopher, Sun Bowl, Sunset, Tonopah
17	Maricopa county Adobe, Agua Fria, Altadena, Angell, Cactus, Campo Bello, Caron, Cave Creek, Century, Deer Valley, Desert Hills, Emerald, Gold Dust, Greenway, La Jolla, Marinette, Moon Valley, Peoria, Sahuaro, Shaw Butte, Shea, Sun City, Surrey, Trinity, Voltaire, Youngtown No. 1,, Youngtown No. 2, Yucca, Webb
18	Maricopa county Alta Vista, Ambassador, Augusta, Barce-

DISTRICTS	DESCRIPTION
	Iona, Belmont, Catalina, Cholla, Cortez, Flynn, Gardenia, Granada-All that portion of Granada precinct east of 27th Avenue. Golden, Harmont, Keim, Lynhaven - All that portion of Lynhaven precinct east of 27th Avenue. Manzanita, Maryland, Montebello, Myrtle, Northview, Roma, Simpson, St. Simon, Sungold, Washington, Westwood - all that portion of Luke precinct east of 27th Avenue.
19	Maricopa county Desert Cove, Desert View, Diana, El Domingo, Glenn, Hatcher, Lupine, Marlette, McLellan, M dows, Mountain View, Nile, Orangewood, Royal, Palm, Solano, Sunny High, Sunnyslope, Wagon Wheel, Dreamy Draw - all that portion of Dreamy Draw lying west of 16th street and 16th street extended, Hayward - all except that portion of Hayward lying south of Northern and east of 7th Street. Hazelwood - all that portion of Hazelwood lying west of 7th Avenue, All that portion of Simis lying west of 7th street. Grandview - all that portion of Grandview lying east of 15th avenue. Westminster - all that portion of Westminster lying east of 15th avenue.
20	Maricopa county Biltmore, Cudia, Joshua, Kiva, Mockingbird, Brentwood, Camelback High, Glenrosa, Harvard, Kachina, LaFayette, Monte Vista, Olivette, Squaw Peak, St. Barnabas, St. George, Suncrest, Ventura, Yale Zuni

CTS DESCRIPTION

- all that portion of Geronimo lying west of 44th street.

Maricopa county
Apache, Arcadia, Buckhorn, Chaparral, Honda, Hualapai, Ingleside, Maricopa, McDonald, Mohave, Navajo, Paiute, Paradise, Picadilly, Pima, Pueblo, Can Carlos, Scottsdale High, Scottsdale West, Yuma, Orange, Hopi, Kaibab.

Maricopa county
Glendale No. 5, Glendale No. 9, Glendale No. 10, Alhambra, Andalucia, Cordova, Crittendon, Downs, Long, Maryvale High, Medlock, Mulberry, Ocotillo, Sevilla, St. Vincent, Valencia, West High, Whitton, Messiah, all that portion of Luke lying west of 27th Avenue, all that portion of Granada lying West of 27 avenue, all that portion of Lynhaven lying west of 27th avenue.

Maricopa county
Avalon, Bethany, Central High, Citrus, Claremont, Desert Park, Lamar, Lawrence, Madison No. 1, Madison No. 2, Madison No. 3, Madison Park, Mount Calvary, Osborn, Plaza, Rancho, Rose Lane, Rovey, St. Francis, St. Thomas, all that portion of Dreamy Draw lying east of 16th street and 16th street extended, all that portion of Hayward lying east of 7th street and south of Northern avenue, all that portion of Simis lying east of 7th street.

Maricopa county
Brill, Capitol, Carnation, Clarendon, Col-

DISTRICTS	DESCRIPTION
	lege, Emerson, Encanto, Flower, Franklin, Kenilworth, Los Olivos, McKinley, Mitchell, Monterey, North High, Palmcroft, St. Gregory, Turney, Westview, Willetta, Wilshire, YMCA, Hazelwood - All that portion of Hazelwood precinct lying east of 7th Avenue, Grandview - all that portion of Grandview lying west of 15th Avenue, Westminster lying west of 15th Avenue.
25	Maricopa county Balsz, Belleview, Cavalier, Creighton, Crockett, East High, Edgemont, Fairmount, Garfield, Griffith, Holly, Hunt, Loma Linda, Longview, Machan, Palm, Papago, St. Agnes, Whittier, Windsor, All that portion of King lying east of 28th Street.
26	Maricopa county Cochise, Coronado, Hohokam, Oak Park, Salt River, St. Daniel, Supai, Tempe No. 1, Tempe No. 2, Tempe No. 3, Tempe No. 4, Tempe No. 13, Tempe No. 14, Tempe No. 15, Tempe No. 22, Tempe No. 23, Tonalea, Tonto, YaYvapai, Barnes, Gardens, All that portion of Geronimo lying east of 44th Street.
27	Maricopa county Avondale, Brown, Butler, Cartwright, Cash, Cashion, Cheery Lynn, Coe, Durango, Gila Crossing, Goodyear, Grand Avenue, Harrison, Hayden High, Isaac, Jackson, Latham, Laveen, Madrid, Murphy, Riverside, Sullivan, Sutton, Tolleson, Zito.

ISTRICTS	DESCRIPTION
28	Maricopa county Bethune, Broadway, Court, Dunbar, Edison, Hermosa, Hialeah, Hope, Julian, Lincoln, Longfellow, Lowell, Monroe, Okemah, Palmdale, Parkview, Rio Vista, Sierra Vista, Skiff, Sky Harbor, South Mountain High, Southminister, Sunland, Wilson, All that portion of King lying west of 28th Street.
29	Maricopa county Chandler No. 1, Chandler No. 2, Chandler No. 3, Chandler No. 4, Chandler No. 5, Gilbert, Guadalupe, Higley, Kyrene, Queen Creek, Tempe No. 5, Tempe No. 6, Tempe No. 7, Tempe No. 8, Tempe No. 9, Tempe No. 10, Tempe No. 11, Tempe No. 12, Tempe No. 16, Tempe No. 17, Tempe No. 18, Tempe No. 19, Tempe No. 20, Tempe No. 21, Tempe No. 24, Barr, Roosevelt, Thunderbird, Valley View.
30	Maricopa county Lehi, Mesa No. 1, Mesa No. 2, Mesa No. 3, Mesa No. 4, Mesa No. 5, Mesa No. 6, Mesa No. 7, Mesa No. 8, Mesa No. 9, Mesa No. 10, Mesa No. 11, Mesa No. 12, Mesa No. 13, Mesa No. 14, Mesa No. 15, Mesa No. 16, Mesa No. 17, Mesa No. 18, Mesa No. 19, Mesa No. 20, Mesa No. 21.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. Civ. 5112 Phx.

NOTICE OF APPEAL

GARY PETER KLAHR, PLAINTIFF,

HERBERT L. ELY, INDIVIDUALLY AND AS CHAIRMAN OF THE DEMOCRATIC PARTY OF ARIZONA, INTERVENOR-PLAINTIFF,

vs.

JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, ET AL., DFENDANTS.

Please take notice that Intervenor-Plaintiff, HERBERT L. ELY, appeals to the Supreme Court of the Third Supplemental Decree entered in this case and filed on May 19, 1970. The statute under which this appeal is taken is the Act of June 25, 1948, ch. 646, 62 Stat. 928, 28 U.S.C.A. 1253.

Dated June 18, 1970.

PHILIP J. SHEA
for Intervenor-Plaintiff

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

PHILLIP J. SHEA, being duly sworn, deposes and says that he is the attorney for Intervenor-Plaintiff Herbert L. Ely; that at 9:30 A.M., on June 18, 1970, he served copies of this Notice of Appeal in accordance with the requirements of Rule 33, paragraph 1, of Supreme Court Rules, by depositing them in a mail box with first class postage prepaid, addressed to the following counsel of record:

Att: JOHN M. MCGOWAN, *Special Assistant*
HON. GARY K. NELSON, *Attorney General*
159 Capitol Building
Phoenix, Arizona 85007

SIMON and JEKEL
Att: J. STEPHEN SIMON
600 N. Old Scottsdale Road
Scottsdale, Arizona 85251

FILED
NOV 24
E. ROBERT SEAVER,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, Appellant,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona and WESLEY BOLIN, Secretary of State of Arizona, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

GARY K. NELSON
The Attorney General of
the State of Arizona

JOHN M. McGOWAN
Special Assistant
Attorney General
159 State Capitol
Phoenix, Arizona 85007
Attorneys for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, Appellant,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of Arizona, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

GARY K. NELSON
The Attorney General of
the State of Arizona

JOHN M. McGOWAN
Special Assistant Attorney General

Attorneys for Appellees

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, Appellant,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona and WESLEY BOLIN, Secretary of State of Arizona, Appellees.

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the three judge District Court for the District of Arizona on the grounds that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and, furthermore, the District Court expressly

limited the effect of its Judgment and Decree to the 1970 elections prior to the completion of the 1970 dicennial census.

QUESTION PRESENTED

Can a Legislature use census figures brought up to date by a fair and defensible formula implemented by computer work as the basis for reapportionment and redistricting on the eve of a dicennial census?

STATEMENT OF THE CASE

In the Judgment and Decree of the three judge District Court of February 2, 1966, and the First Supplemental Decree filed March 14, 1966, the Court implemented its own division of the precincts and counties of Arizona under what was then considered acceptable degrees of deviation, plus or

minus 15%. The Legislature of Arizona was elected in 1966 and 1968 under that Decree.

The Legislature, at a special session in 1967, enacted Chapter 1, 28th Legislature, First Special Session, apportioning both the Senate and the House of Representatives of Arizona. That measure was referred to the people of Arizona in the general election of 1968, and met with their approval. The three judge District Court in an opinion filed July 22, 1969, struck down this proposal, basing its decision on the subsequently decided cases of Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and Wells v. Rockefeller, 394 U.S. 542 (1969).

The Legislature was called into special session in January of 1970, and enacted Chapter 1 of the First Special Session of the 29th Legislature of the State of Arizona,

1970, the subject matter of this appeal.

The three judge District Court was again convened to rule on the constitutional validity of the new apportionment plan. Appellant, Intervenor-Plaintiff below, submitted to the Court, and asked the Court to place into effect, an apportionment plan devised by his counsel.

The District Court thus had four alternatives. It could decide: (1) that the 1966 court ordered plan should remain in effect; (2) that the new legislative apportionment should be used; (3) to place Appellant's plan into effect; or (4) to rule that at-large elections must be held.

On careful reflection, the District Court opted for instituting the new legislative plan solely for purposes of the 1970 general election. In its decree the District Court

directs the Legislature to draw a new apportionment plan when the 1970 census figures are available, to be completed no later than November 1, 1971.

ARGUMENT

We respectfully submit that the Third Supplemental Decree of the District Court (see pages 18a, et seq., of the Appellant's Jurisdictional Statement) was the best practical alternative which was available to the District Court under the time pressure of the upcoming primary election.

That decree, a reasonable order designed to prevent the chaos of an at-large election, grants redress to any party if the Legislature fails to properly apportion itself by November 1, 1971, using the population statistics from the 1970 census which will become

available in the summer of 1971. The effect of the decree is thus not a final judgment in the sense that the parties would be precluded from further relief at the District Court level.

We further point out that the apportionment plan adopted by the District Court was viewed by that Court as the least unconstitutional and most workable of the three alternative plans. The decree limits the use of this apportionment to the 1970 election. The alleged unconstitutionality is, therefore, not a problem which is ". . . capable of repetition, yet evading review." Southern Pacific Terminal Company v. I.C.C., 219 U.S. 498 (1911).

No useful purpose could be served by this Court ruling on this matter at this point. This Court has repeatedly expressed its

unwillingness to draw reapportionment plans, wisely leaving that mechanical function to the respective state legislatures. See, e.g., Kirkpatrick and Wells, supra.

We most strongly urge that this Court need make no ruling where, as here, the state legislature is already under the judicial compulsion of the District Court decree to reapportion itself. Armed with the new statistics from the 1970 census, the Legislature will be able to draw legislative districts with the precision outlined by this Court in the Kirkpatrick and Wells cases.

We turn now to the cases cited by Appellant in his Jurisdictional Statement in the belief that they sustain the jurisdiction of this Court. Each of them is entirely distinguishable from the case at bar.

In Moore v. Ogilvie, 394 U.S. 814 (1969), independent candidates for the offices of electors of President and Vice President of the United States sought declaratory and injunctive relief, after the election, from state statutes by which their names were not allowed on ballots. While holding that the question was not moot, the Court relied exclusively on the fact that the "burden. . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections. The problem is therefore 'capable of repetition, yet evading review.' . . ." 394 U.S. 816.

Such is not the case at bar, where the District Court approved the reapportionment plan solely for purposes of the 1970 election. The order specifically promises redress to any party if the Legislature fails

to properly apportion itself when the new census figures become available (see Jurisdictional Statement, page 20a, Paragraph VII of the Third Supplemental Decree).

Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73 (1960), merely upheld the language of 28 U.S.C., § 1253, which provides that an order granting or denying an injunction in any civil action "required by any Act of Congress to be heard and determined by a district court of three judges" may be appealed directly to the United States Supreme Court. There was no issue of mootness or finality; the District Court had dismissed the suit for injunction, a final decision. In that case the constitutional harm claimed would continue against the plaintiff. Such continuing harm is not present in the case at bar.

Query v. United States, 316 U.S. 486 (1942), held that final orders of a three judge District Court are directly appealable to the Supreme Court. That point is not in issue in the case at bar. The District Court has retained jurisdiction of the matter until at least November 1, 1971, (Paragraph VII of the Third Supplemental Decree) and the decree is thus not final at this point.

Palmetto Fire Insurance Co. v. Conn., 272 U.S. 295 (1926), decided before the streamlined appeal procedure was instituted in federal courts, held that where the District Court grants or withholds an injunction on the ground of the unconstitutionality of a state law, appeal to the Supreme Court is allowed. Again, that is not in issue here. The state apportionment law is of no force

and effect now that the election is over. Any damage which may have been done, and we point out that no damaging effect is demonstrable, is incapable of repetition.

Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928), held that a District Court order dismissing an action which challenged the constitutionality of a state statute was reviewable by the Supreme Court. In the case at bar, there is no dismissal of the action, the District Court decree not being of a final nature.

Kesler v. Department of Public Safety of Utah, 369 U.S. 153 (1962), offers little comfort to Appellant. That case holds that a direct appeal to the United States Supreme Court from the judgment of a three judge District Court lies only when the case was a proper one for convening a three judge court.

". . . [T]his Court has been led by a long series of decisions, in a variety of situations, to generalize that this procedural device was not to be viewed 'as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.' [Citation omitted]." 369 U.S. 156.

There the action of the District Court was final in that the statute in question was upheld and relief denied. The injury caused by the alleged unconstitutionality of the statute was continuing and capable of repetition, unlike the situation in the case at bar.

The whole thrust of the legislative endeavor was an attempt to follow the mandate of Kirkpatrick and Wells without any regard to county lines or any other artificial deterrent to achieving absolute equality of numbers in each district. A formula was

adopted which converted 1968 precinct voter registration to 1960 precinct population. The formula is as follows:

$$\text{1968 Precinct Voter Registration} \times \frac{\text{1960 County Population}}{\text{1968 County Registration}} = \text{1960 Precinct Population.}$$

This formula is best understood by realizing that a certain percentage of the people registered to vote in a county reside within any given precinct, and by multiplying this percentage by the county census population, one can arrive at a precinct population figure. The Legislature felt that this formulaed precision was necessary in order to be within the bounds of the instructions of the Kirkpatrick case.

". . . The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' Wesberry v Sanders, supra, at 18, 11 L Ed 2d at 492, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise methematical [sic] equality." 394 U.S. 531, 532.

By the very definition, or lack of the same, in the census tract descriptions, it is impossible in a rapidly growing state to use these as a basis when the figures are nine to ten years old.

The three judge District Court in 1966, in drawing the plan under which two Legislatures were elected (1966 and 1968), used 1960 census data when dealing with whole counties and the most recent voter registration data as the basis of subdivisions within

counties. The Legislature felt it was safe to use this with the aid of the most modern method of accurate computation, to-wit, a computer, in order to effectuate the mandate of this Court, as set forth in Kirkpatrick and Wells.

Attached hereto as an appendix is a copy of the letter written by the chief architect of the mechanics of this plan, addressed to the Speaker of the House and the President of the Senate, explaining the method used in arriving at this measure.

In order to achieve compactness, or as nearly as possible, there are, of course, concentrations of the same ethnic group in certain districts. This is by virtue of the geography of Arizona rather than through any design, intent or invidious plan to discriminate. Confessedly, this is only a temporar

plan, enacted on the eve of a new census, in one of the three most rapidly growing states in the Union.

The burden now rests on the Legislature of Arizona to use current figures under the mandate of Kirkpatrick and Wells for the election of 1972.

If, as is alleged, this was a purposeful discriminatory enactment, there should have been a great change in the make-up of both houses. As it so happens, the House remains the same percentage of Republicans and Democrats as under the previous court enacted plan, and there is a net gain of one Republican in the Senate. This was from District 3, where registration was overwhelmingly Democratic.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the questions on which this cause depend are moot, that the District Court decree was not a final disposition of the matter, and that the three judge District Court has provided for the reflective demise of this matter merely as a temporary measure prior to receipt of the 1970 census figures.

Appellees respectfully move this Court to dismiss this appeal or in the alternative to reaffirm the judgment entered in the cause by the three judge District Court in Arizona.

October 1970.

Respectfully submitted,

GARY K. NELSON
The Attorney General of
the State of Arizona

JOHN M. McGOWAN
Special Assistant
Attorney General

OFFICE OF THE MARICOPA COUNTY RECORDER

February 9, 1970

The Honorable William S. Porter
President of the Senate
Senate Wing, Capitol Building
Phoenix, Arizona 85007

The Honorable John H. Haugh
Speaker of the House
House Wing, Capitol Building
Phoenix, Arizona 85007

Gentlemen:

I am writing to explain in further detail the techniques which were employed in the reapportionment program and the rationale behind them. Let me begin with the rationale.

As you know, the reapportionment committee was at a loss as to whether they should employ 1960 census data or 1968 voter registration, or some combination of both in an updated reapportionment plan.

In writing the computer program, which subsequently produced the plan adopted by the Legislature, I had to make some decisions about which data should be included in the computer program. I rejected using pure 1960 census data for three reasons. First, it has been well-established that, due to the phenomenal growth of Arizona, these figures are sadly out of date. Secondly, it has been further established that the use of pure 1960 census data would effectively disenfranchise the newcomer to Arizona.

PAUL N. MARSTON, RECORDER PAUL A. THOMAS, CHIEF DEPUTY

103 COUNTY ADMINISTRATION BUILDING 111 SOUTH THIRD AVENUE PHOENIX, ARIZONA

Thirdly, there is the fact that there is almost no relationship between census tract and enumeration district boundaries and our political precinct boundaries, making it impossible to arrive at an accurate figure for a 1960 census count within an existing precinct.

I considered using census tracts instead of precincts and letting the various counties fit their precinct structure to the census tracts. This proposal was rejected because, quite often, the census tracts were unsuitable for use as a political precinct, even when subdivided; and, secondly, because we discovered that there were no legal descriptions for the census tracts, making it impossible to draft a bill employing same.

Also considered was the possibility of using pure 1968 voter registration data, as this count is available on a precinct by precinct basis, and this figure does tend to show where the people live now, as opposed to where they lived ten years ago. This approach was rejected, since it has been contended, with some justification, that the use of voter registration data disenfranchises minority groups, particularly Indians, who are much less likely to register to vote.

We were faced then with the problem of neither of the readily available statistics being able to satisfactorily do the reapportionment job.

Our solution was to adopt the approach that the Federal District Court took in its temporary plan, when they used 1960 census data when dealing with whole counties and the most recent voter registration data to subdivide inside counties. The advantage of this approach, I felt, was that the census data gave weight to a county for all of the people within it, whether registered to vote or not, and yet gave weight to the people who have moved to Arizona in recent years. In this fashion we can give weight to the minority groups and to the newcomer without disenfranchising either.

Our first problem was to devise some method of converting voter registration to census figures, or vice versa, since the two cannot be added together any more than apples and oranges can be added together. A formula was adopted which converted 1968 precinct voter registration to 1960 precinct population. The formula is as follows:

$$\text{1968 Precinct Voter Registration} \times \frac{\text{1960 County Population}}{\text{1968 County Registration}} = \text{1960 Precinct Population}$$

This formula is best understood by realizing that a certain percentage of the people registered to vote in a county reside within any given precinct, and by multiplying this percentage by the county census population, one can arrive at a precinct population figure.

The basic reason for the adoption of this formula in the reapportionment plan is that there did not seem to be any other way to proceed from a mechanical point of view. We could not get a census count by precinct, and we could not make the precincts fit the census boundaries. The plan devised uses 1960 census data for the counties and voter registration data within a county. The formula serves only as a means to cross county boundaries, and not mix apples and oranges. It should be emphasized that, with the use of this formula, in dealing with a county as a whole, you are using census data; and in dealing with a portion of a county, you are using voter registration data.

The computer program was designed to be able to cross county boundaries, since it was our interpretation of the most recent court decisions, that population deviations must be as close to zero as possible. To accomplish this goal, everything must be sacrificed, and that certainly includes county integrity. The results, I think, speak for themselves.

By using a computer, we were able to keep the deviations under 1%, and I personally feel that it is not possible, within any reasonable amount of time, to get them any lower than they are in the plan adopted by the Legislature. For these reasons, I believe that if the Court will accept the use of the mix of 1960 census and 1968 voter registration data, that they will uphold the Legislature's plan.

If you have any questions, or if I can be of any further service to you in this matter, just let me know.

Sincerely yours,

Paul

PAUL N. MARSTON
Maricopa County Recorder

PNM:ell

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

JOHN M. McGOWAN, being duly sworn, deposes and says that he is the attorney for Defendant Appellees Jack Williams, Governor of Arizona, and Wesley Bolin, Secretary of State of Arizona; that at 5 p.m. on November 23, 1970, he served copies of this Motion to Dismiss or Affirm in accordance with the requirements of Rule 33, paragraph 1, of Supreme Court Rules, by depositing them in a mail box with first class postage prepaid, addressed to the following counsel of record:

PHILIP J. SHEA
Suite 310, 114 West Adams Street
Phoenix, Arizona 85003

SIMON AND JEKEL
Attention: J. Stephen Simon
600 North Old Scottsdale Road
Scottsdale, Arizona

JOHN M. McGOWAN
Special Assistant Attorney General

SUBSCRIBED AND SWORN to before me this

_____ day of November, 1970.

_____

NOTARY PUBLIC

My Commission expires:

_____

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Feb 9 1971
E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, *Appellant*,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of Arizona, *Appellees*.

On Appeal from the United States District Court for the District of Arizona

---

BRIEF FOR APPELLANT

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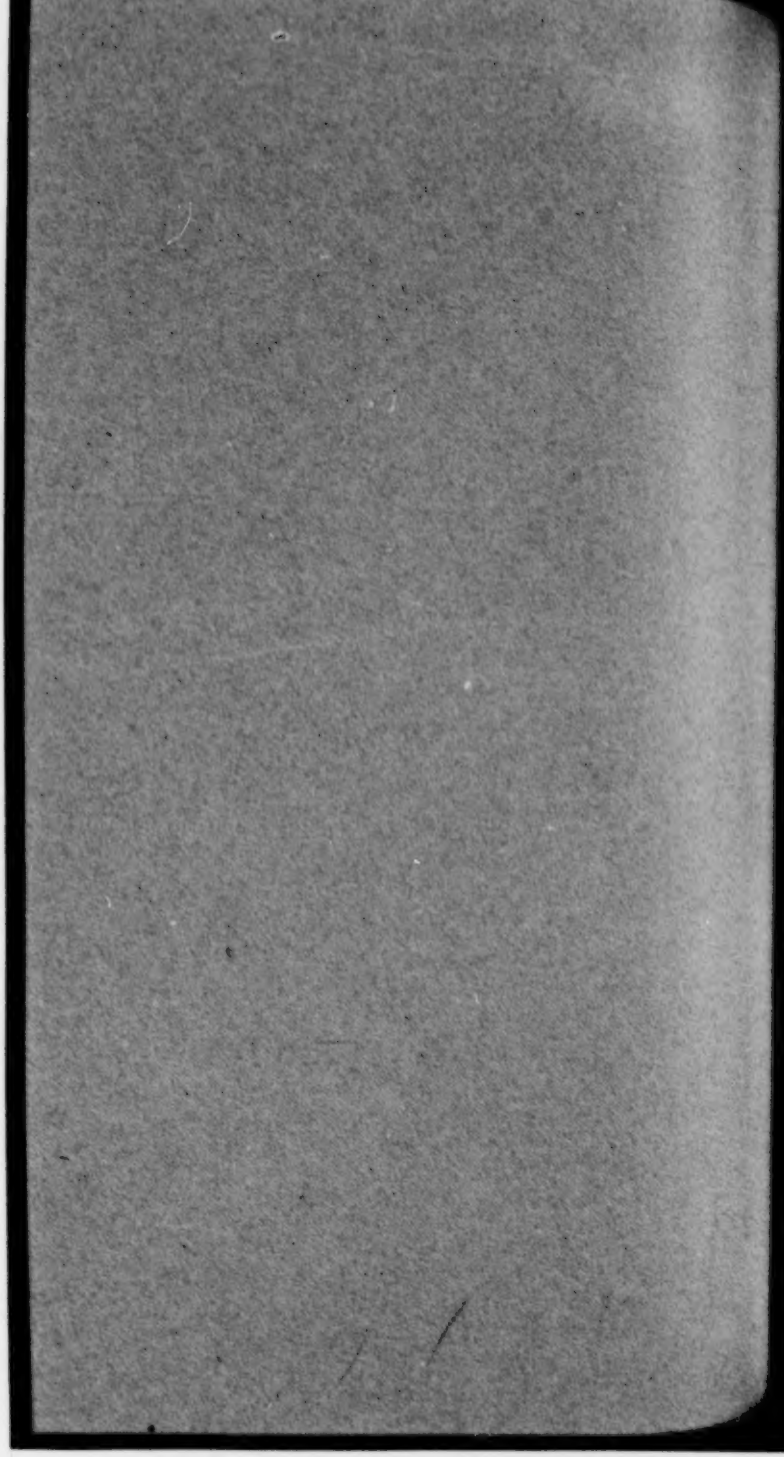

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On Appeal from the United States District Court for the District of Arizona

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BRIEF FOR APPELLANT

THE OPINIONS BELOW

The decree of the District Court for the District of Arizona holding that both houses of the Arizona Legislature were unconstitutionally apportioned was filed on February 2, 1966 and appears at 250 F. Supp. 537.

(App. 37, 51) This decree was modified by a First Supplemental Decree filed on March 14, 1966, and a Second Supplemental Decree filed on December 5, 1966, which appear at 254 F. Supp. 997 and 289 F. Supp. 827 respectively. (App. 61, 66) The decree from which this appeal was taken was filed on May 19, 1970, and appears at 313 F. Supp. 148. (App. 111, 114)

JURISDICTION

This is a direct appeal from an interlocutory order dated May 19, 1970, of a three judge court denying an injunction. Jurisdiction is conferred by 28 U.S.C.A. 1253. The notice of appeal was filed on June 18, 1970, which was within the time allowed by 28 U.S.C.A. 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES

Involved in this case is whether the citizens of Arizona are entitled to the protection afforded by Section 1 of the Fourteenth Amendment to the United States Constitution which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also involved in this case is Chapter 1, Twenty-ninth Legislature, State of Arizona, First Special Session, signed into law on January 22, 1970. (App. 87)

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether it was error for the District Court to refuse to enjoin the enforcement of an Arizona legislative redistricting statute which creates districts with grossly unequal numbers of people and which substantially impairs the voting rights of the poor, the urban ethnic minorities, the agricultural farm workers, and the American Indians. The subsidiary question fairly comprised in the foregoing is whether it was error for the District Court to fail to fashion appropriate relief, and to refuse at this time to fashion such relief, by ordering a Constitutionally valid plan to be placed into effect based on population figures and other necessary evidence that has been presented to it.

STATEMENT OF THE CASE

A statement of the procedural background of this case, beginning with filing of the complaint, will be conducive to a proper understanding of the issues. More importantly though, it will illustrate the capacity of the Arizona Legislature for endless delay in fulfilling its obligation to remedy an outrageous impairment of the Constitutional rights of the citizens it serves.

The complaint was filed on April 27, 1964, (App. 1) which was two years after this Court's determination that malapportionment of state legislatures violated the Equal Protection clause, that the federal courts had jurisdiction to fashion relief for such a violation, and that voters such as the plaintiff Klahr had standing to seek relief. *Baker* v. *Carr,* 369 U.S. 186 (1962). At that time the sparsely populated counties were overrepresented in both houses of the Legislature in ac-

cordance with the Constitution of Arizona, Article 4 Part 2, Section 7.

On June 25, 1964, the Court ordered all proceedings to be stayed until after the next regular session of the Legislature and, when nothing was accomplished during that time, postponed the matter again until after a special session which had been ordered by the Governor. (App. 2-3, 3-4) During that session the Legislature came up with Senate Bill 11 which grossly malapportioned the Senate and did not deal with the House. The decree of February 2, 1966, held it to be unconstitutional. (App. 37, 51)

By the decree of February 2, 1966, the Court also undertook to impose its own "temporary and provisional" plan. This plan provided for thirty legislative districts as follows: Maricopa County (including Phoenix) was to be subdivided into fifteen districts on the basis of voter registration; Pima County (including Tucson) was to be divided into six districts on the same basis; and the remaining districts were rural counties or groups of rural counties. As the Court noted in its decree of May 19, 1970, the deviations under this plan were +15.5 per cent to —6.5 per cent in the rural districts. (App. 117) The deviations within the urban counties due to the voter registration rather than population figures was not computed. This plan was used in the general elections of 1966 and 1968.

The second effort of the Legislature to reapportion itself yielded Chapter 1, Twenty-eighth Legislature, First Special Session, enacted in June, 1967. This was subjected to referendum, approved by the voters, and proclaimed into law on January 17, 1969. This was yet another reapportionment on the basis of registered voters rather than people and it provided for deviations of plus or minus 40 per cent until 1971, and plus

or minus 16 per cent thereafter. It was declared unconstitutional by the decree of July 22, 1969. (App. 82)

In its third and last attempt to redistrict the State the Legislature gave us Chapter 1, House Bill 1, Twenty-ninth Legislature, First Special Session, which was signed into law on January 22, 1970. (App. 87) The hearing on the validity of this plan was followed by the decree of May 19, 1970, upon which this appeal is based. A review of the propriety of this decree requires an inquiry not only into what the Court did but what it could have done and should now do to bring Constitutional apportionment to Arizona.

Chapter 1 is the creation of a computer which was operated by Mr. Paul Marston who happens to be the Recorder of Maricopa County, and he explained at the hearing how he arrived at it. (Tr. 62-82) Briefly the computer was told to form thirty districts (one senator and two representatives to be elected from each district) by grouping together political precincts. Since no one knows how many people reside in the precincts the computer was told to assume precinct population to be that part of 1960 county population which the number of registered voters in the precinct in 1968 bears to the number of registered voters in the county in 1968. The computer was instructed to accomplish the following objectives in the following order: (1) to make the districts as equal as possible; (2) to circumscribe the districts in such a way that each includes one incumbent senator and two incumbent representatives; (3) to make the districts compact; and (4) to make districts politically homogeneous.

An alternative plan was presented to the Court by appellant which also provided for thirty districts. In

this plan however the districts were groupings of census enumeration tracts for the reason that the number of people in census tracts (as distinguished from precincts) is known. The population figures used in the plan were 1960 statewide census or 1965 partial census projected to 1968 by the Arizona Employment Security Commission working under the supervision of the United States Census Bureau. (Tr. 164-169) The adoption of this plan would require changes in the precinct boundaries to coincide with precinct boundaries. Or, if time would not have permitted such changes before the next election, the district boundaries could have been changed to coincide with precinct boundaries. (Tr. 229-233)

The Court in its decree of May 19, 1970, agreed with appellant's approach in principle but ordered the use of the Chapter 1 plan for the 1970 general election. Thereafter, the decree holds, the Legislature should be given yet another chance, until November 1, 1971, before the Court will entertain proposals of any party for a plan to be imposed by the Court.

ARGUMENT

It is natural and common to compare this Court's stand against malapportionment, beginning with *Baker* v. *Carr* (*supra*) in 1962, with its stand against public segregation beginning with *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954). Both cases dealt with old and deep problems. And both were to be followed by aggravation caused by those who would not have the will to obey the law of the land. It is in that context, i.e., the years of stubborn refusal to do the right thing, that the malapportionment problem in Arizona should be viewed. No longer need we inquire

into what the law requires. The decree of May 19, 1970, indeed displays a clear understanding of the Court below as to what needs to be done. It is not appropriate now then to define the mandate of *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and the others. Rather, guidance is to be sought from the mandate of *Watson* v. *City of Memphis,* 373 U.S. 526 (1963).

Watson v. *City of Memphis* dealt with Memphis's stubborn delay in fully desegregating its parks and other public facilities. This Court there noted that *Brown I* had been decided nine years before and that it had been held applicable to public recreational facilities eight years before. This Court then stated:

> "The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason they are promptly to be fulfilled." 373 U.S. 526, 533.

In this case as in *Watson,* any time leeway that may be allowed by the "deliberate speed" doctrine has long since been used up.

The denial of Constitutional rights in this case is particularly obnoxious because of its ugly racial overtones. The people who are sadly underrepresented are not, as perhaps in other cases, rural people or city people or upstate people or downstate people. The victims in Arizona are the poor, the black, the Mexican-Americans, and the American Indians. It is for instance the minority people of South Phoenix who are in a district of 70,000 people, or 24.1 per cent more than the norm; and it is their affluent all-white

neighbors in Northeast Phoenix that are in a district of 27,000 people, or 52.1 per cent less than the norm—a range from top to bottom of 76.2 per cent. (Tr. 176-179) And the huge area of northeastern Arizona which constitutes the Navajo and Hopi Indian Reservations with 70,000 people do not enjoy a district of their own but continue to be dominated by their white neighbors to their south. (Tr. 132-133) In short, the very people whose only instrument for effecting lawful constructive change is the ballotbox have not been helped by "reapportionment" in Arizona. And they never will as long as the Courts keep putting us off until the Legislature acts.

It was a travesty for the Court to permit the defendants to deprive these citizens for at least two more years of political rights which they so greatly need in these times. The Court had a plan before it which would have cured the evil. If the Court did not approve of it in every respect all the data needed for changing it was on hand. To those who would say there was not time before the next election to "tool up" for the change the Court should have answered: "Do it or run at large." They would have done it.

True, the 1970 general election has already been held so that that aspect of the wrong cannot be remedied. But we still do not have reapportionment in Arizona. And there is no reason now to believe that the present malapportioned Legislature is any more prepared than the prior three Legislatures to reapportion some of its members out of jobs. For this reason the stay of proceedings ordered by the decree below to November 1, 1971, substantially prejudices the interests of the citizens who are wronged. When the Legislature does fail to do the right thing appellant again will present

a fair plan, hearings will be scheduled and sometime in 1972 the Court will again find that it is too late to "tool up" for the changes that are required by law.

For these reasons appellant respectfully requests this Court to order the Court below forthwith to hold hearings on reapportionment proposals by any party and to impose upon the State of Arizona any such plan that cures the present inequities and to continue such plan in effect until the Legislature complies with the earlier mandates of this Court. Without this sort of relief the job will never get done.

Respectfully submitted,

HERBERT L. ELY,
Intervenor-Plaintiff

FILE COPY

FILED
MAR 8 1971

IN THE

Supreme Court of the United States

October Term, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona,

Appellant,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of Arizona,

Appellees.

APPELLEES' ANSWERING BRIEF

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Appellees.

APPELLEES' ANSWERING BRIEF

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellees agree to the constitutional and statutory provisions set forth in Appellant's Brief.

QUESTION PRESENTED

The question presented for review is whether or not

the District Court has fashioned a full and complete remedy to Arizona's apportionment and districting problems when it compels the Legislature to reapportion according to the very latest, most complete census figures available, namely, the 1970 decennial census report, such reapportionment to be completed a full year before the new plan would have any practical effect in the 1972 elections, leaving ample time for judicial determination of the constitutional validity of the new plan.

SUMMARY OF ARGUMENT

A question is moot when, as here, judicial action will not or cannot repair the alleged injury. The 1970 elections, the only elections which will ever be held under the apportionment scheme whose constitutionality was decided in the District Court below, have already been held. Appellant does not challenge the outcome or the validity of those elections.

The Legislature is already under judicial compulsion to accomplish a valid reapportionment plan by November 1, 1971, although that plan will have no practical effect until the elections of 1972. Not only is there ample time before the 1972 elections for the Legislature to reapportion, there is ample time and judicial machinery readily available for that plan to be tested.

We therefore respectfully submit that there is nothing which this Court can do which will be more effective than what is already being done.

This Court has established a wise line of precedents in refraining from disturbing District Court rulings on reapportionment cases which are in the posture of the case at bar. The landmark cases of 1964 recognize that primary responsibility for reapportionment rests with the

Legislature rather than the judicial system. This Court has consistently upheld District Court rulings in reapportionment cases where the remedy fashioned below closely paralleled that in the case at bar.

The Legislature is now, perhaps for the first time, equipped to do an adequate job of reapportioning and redistricting. Obsolescence of census figures, a barrier which would render any plan suspect, can now be overcome through the use of the 1970 decennial statistics. The Legislature, with the help of computer technology, has already exhibited its good faith and its willingness to abide by the mathematical exactitude prescribed by this Court in the latest reapportionment cases. As mentioned earlier, there is ample time for a new legislative apportionment and districting plan to be promulgated and judicially tested before the 1972 elections.

ARGUMENT

I

THIS CASE IS MOOT FOR LACK OF A CASE OR CONTROVERSY

A question is moot when, as here, judicial action will not or cannot repair the alleged injury. Chief Justice Warren discussed the requirement of a case or controversy in *Flast v. Cohen*, 392 U.S. 83 (1968), where he said:

> "In part those words limit the business of federal courts to questions presented... in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 95.

In the case at bar we have a situation which cannot be

further resolved at this point by any action this Court may decide to take.

The single issue presented is the wisdom of the District Court ruling that Arizona's latest reapportionment plan, while partially unconstitutional, was workable enough for purposes of the 1970 elections, but would be set aside thereafter and the Legislature ordered to draw a new apportionment plan based on the 1970 decennial census figures. This new plan is to be completed not later than November 1, 1971, and if this plan is felt to be invalid, "any party to this action may apply to the court for appropriate relief." *Klahr v. Williams*, 313 F.Supp. 148, 154 (D.Ariz. 1970).

The 1970 elections, the only ones which will ever be held under the now invalid plan, have already been held. Neither the validity nor the outcome of those elections has been challenged by Appellant. Appellant does not allege any injury from the latest elections, and does not ask this Court to tamper with the results thereof.

We further note that the redistricting and reapportionment that the Arizona Legislature is already under judicial compulsion to accomplish by November 1 of this year will have no practical effect until the elections of 1972. Not only is there ample time for the Legislature to draw up a valid plan, the District Court ruling leaves additional time for that scheme to be judicially tested before it goes into effect.

By the time this matter is heard before this Court and a decision handed down, it will be closely approaching the deadline already set by the court below. It is obvious that there is little this Court can do which will be more effective than what is already being done. The case is, at this point, not "capable of resolution through the jud-

icial process", and should therefore be dismissed as moot.

II

ASSUMING ARGUENDO THAT THE CASE IS NOT MOOT, THIS COURT SHOULD FOLLOW ITS EARLIER PRECEDENTS AND REFRAIN FROM INTERFERING WITH THE REMEDY FASHIONED BY DISTRICT COURTS IN REAPPORTIONMENT CASES SUCH AS THE ONE AT BAR

The task of accomplishing a valid plan for apportionment rests with the Legislature. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the then Chief Justice, speaking for the majority, commended the District Court for its decision, "...not to usurp the primary responsibility for reapportionment which rests with the Legislature." 377 U.S. at 586.

The sole issue of this case is the wisdom of the District Court's decision to allow the Legislature to set its own house in order. The constitutionality of any given apportionment scheme is not in issue here. In two similar cases this Court has given generous approval to the same sort of remedy fashioned by the court below.

In *Reynolds v. Sims, supra*, this Court commended the court below, saying:

> "In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the court below proceeded in a proper fashion." 377 U.S. at 587.

Shortly thereafter, in *Davis v. Mann*, 377 U.S. 678 (1964), this Court again approved action by a lower court which paralleled the District Court's ruling:

> "Since the District Court stated that it was retaining jurisdiction and that plaintiffs could seek further appropriate relief, the court below presumably intends to take further action should the Virginia Legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan." 377 U.S. at 693.

Appellees respectfully and earnestly submit that this Court should not now dispute the wisdom of the District Court's ruling when it has consistently upheld similar rulings by courts below in cases which so closely parallel the case at bar.

III

NOW ARMED WITH THE NEW DECENNIAL CENSUS FIGURES, THE LEGISLATURE IS EQUIPPED TO DRAW A VALID PLAN FOR REDISTRICTING AND REAPPORTIONMENT WITH THE USE OF CURRENT POPULATION FIGURES

Arizona's redistricting and reapportionment problem, like that of other states, has been magnified by the unavailability of up-to-date census figures. As Mr. Justice Harlan noted in his dissent in *Wells v. Rockefeller*, 394 U.S. 542 (1969):

> "Census figures themselves are inexact; our mobile population rapidly renders them obsolete; large

groups of ineligible voters are unevenly distributed throughout the State." 394 U.S. at 550.

Mr. Justice Fortas pointed to the problem with Missouri's reapportionment attempts in his dissent to *Kirkpatrick v. Priesler*, 394 U.S. 526 (1969):

> "The base to which Missouri's legislature should have adhered precisely, according to the majority, is the 1960 decennial census. The legislature's plan here under review was enacted in 1967. Assuming perfect precision for the 1960 census when taken, by 1967, because of the movement of population within the State as well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base..." 394 U.S. at 539, 540.

Considering the volatile nature of Arizona insofar as growth and expansion are concerned, it is obvious that the disparities noted by Mr. Justice Fortas were greater here than in Missouri, particularly when we were concerned with the last possible election after the 1960 decennial census. Indeed, the District Court recognized the almost impossible problem faced by the Legislature:

> "In truth, it appears that the lack of an official state census since 1960, accompanied by the large increase in population since 1960, has understandably left the Legislature uncertain as to how to arrive at a valid population basis for reapportionment and redistricting." *Klahr v. Williams*, 313 F. Supp. at 153.

With the 1970 census figures, the Arizona Legislature will be well equipped to draw a valid plan for the redistricting and reapportionment of the state in order to

comply with the "one man, one vote" mandate of this Court.

The Legislature has already shown its good faith, as is evidenced by the extremely small deviation figures which resulted from the computerized plan which was the last attempt at reapportionment. While ruling that the Legislature used an incorrect population conversion formula, the District Court noted:

> "The legislative districts produced with the aid of the computer do have a remarkably small deviation from the ideal or the norm, ranging between one district with a +.81% deviation and a district with a -.99% deviation, or a total deviation range of 1.8% ..." 313 F.Supp. at 152.

With the guidelines laid down by the *Kirkpatrick* and *Wells* decisions, *supra*, with the use of computer technology, and armed with accurate statistical information as to census figures, the Legislature will have little difficulty in drawing up a valid plan for redistricting and reapportioning Arizona prior to November 1, 1971.

We further note that here, as in the case of *Wells v. Rockefeller, supra*:

> "...[A]mple time remains to promulgate a plan meeting constitutional standards before the election machinery must be set in motion for the [next] election." 394 U.S. at 547.

9

IV

THIS COURT SHOULD NOT MAKE AN UNWARRANTED INTRUSION INTO THE BUSINESS OF THE LEGISLATURE BY RULINGS BEYOND THE SCOPE OF ESTABLISHED NOTIONS OF JUDICIAL REVIEW

We note Mr. Justice Harlan's comment in his dissent to the *Wells* decision, *supra*:

> "This all-pervasive distrust of the legislative process is completely alien to established notions of judicial review." 394 U.S. at 550.

Mr. Justice White, dissenting in that same opinion, pointed out another danger if this Court demands unreasonable exactitude in reapportionment cases, when he said:

> "Ultimately, the courts may be asked to decide whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality. Using the spacious language of the Equal Protection Clause to inject the courts into these minor squabbles is an unacceptable pre-emption of the legislative function." 394 U.S. at 556.

The Legislature of the State of Arizona, in a dedicated attempt to follow the mandate of *Kirkpatrick v. Priesler* and *Wells v. Rockefeller*, *supra*, achieved numerical equality in each district of less than one per cent, as provided by the updating of the 1960 census figures. The Legislature stands ready, willing and able to follow the mandate of the District Court to use 1970 decennial cen-

sus figures with the same abject obedience to the mandate of *Kirkpatrick* and *Wells* as to numerical equality.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this question is now moot, and the Legislature will proceed to carry out its responsibilities as per the direction of the District Court.

Respectfully submitted,

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October, 1970

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SUPREME COURT OF THE UNITED STATES

No. 548.—October Term, 1970

Herbert L. Ely, Individually and as Chairman of the Democratic Party of Arizona, Appellant, *v.* Gary Peter Klahr et al.	On Appeal From the United States District Court for the District of Arizona.

[June 7, 1971]

Mr. Justice White delivered the opinion of the Court.

This appeal is the latest step in the long and fitful attempt to devise a constitutionally valid reapportionment scheme for the State of Arizona. For the reasons given, we affirm the judgment of the District Court.

In April 1964, shortly before this Court's decision in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its companion cases, suit was filed in the District Court for Arizona attacking the then-existing state districting laws as unconstitutional.[1] Following those decisions, the three-judge District Court ordered all proceedings stayed "until the expiration of a period of 30 days next following adjournment of the next session" of the Arizona Legislature. (App. 2–3, unreported.) Nearly a year later, on May 18, 1965, after the legislature had failed to act, the

[1] Throughout this litigation, congressional districting has been at issue as well and has suffered the same fate as reapportionment of the legislature. However, appeal has been taken here only with respect to the lower court's decree concerning legislative reapportionment.

court again deferred trial pending a special legislative session called by the Governor to deal with the necessity of reapportionment. The special session enacted Senate Bill 11, which among other things provided one senator for a county of 7,700 and another for a county of 55,000. The session did not undertake to reapportion the House. Trial was had in November 1965 and on February 2, 1966, the court enjoined enforcement of Senate Bill 11, which, it held, "bears evidence of having been thrown together as a result of considerations wholly apart from those laid down as compulsory by the decisions of the Supreme Court." *Klahr* v. *Goddard*, 250 F. Supp. 537, 541 (Ariz. 1966). The plan, said the court, was "shot through with invidious discrimination." *Id.*, at 546. The court also held that the existing House plan produced disparities of nearly four to one, which was clearly impermissible under our decisions.

Noting that the legislature "has had ample opportunity" to produce a valid reapportionment plan, the court formulated its own plan as a "temporary and provisional reapportionment," designed to govern the impending preparation for the 1966 elections. The plan was to be in effect "for the 1966 primary and general elections and for such further elections as may follow until such time as the Legislature itself may adopt different and valid plans for districting and reapportionment." [2] *Id.*, at 543. It retained jurisdiction, as it has done since.

Some 16 months later, in June 1967, the Arizona Legislature enacted "Chapter 1, 28th Legislature," which again attempted reapportionment of the State. Within the month, suit was filed charging that this bill also was unconstitutional, but the court deferred action pending

[2] The court issued two supplemental decrees in 1966 which modified and clarified the original order. 254 F. Supp. 997 (Ariz. 1966), 289 F. Supp. 827 (Ariz. 1966).

the outcome of a referendum [3] scheduled with the November 1968 election for the legislature and Congress. It ordered those elections to be held in accordance with its own 1966 plan, as supplemented. *Klahr* v. *Williams*, 289 F. Supp. 829 (Ariz. 1967). The legislative plan was approved by the voters in the referendum and signed into law by the Governor on January 17, 1969. A hearing on the plan was commenced the same day. The Court concluded on July 22, 1969, that the plan, which set up "election districts" based on population and "legislative" subdistricts based on voter registration, would allow deviations among the legislative subdistricts of up to 40% from *ideal* until 1971, and up to 16% thereafter. The court properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality. The court ordered its 1966 plan continued once again "until the Legislature shall have adopted different, valid, and effective plans for redistricting and reapportionment . . . ." (App. 85, unreported.) It refused to order the 1970 elections to be held at large, since there was "ample time" for the legislature "to meet its obligation" before the machinery for conducting the 1970 elections would be engaged.

The legislature attempted a third time to enact a valid plan. It passed "Chapter 1, House Bill No. 1, 29th Legislature," which was signed into law by the Governor on January 22, 1970, and which is the plan involved in the decision from which this appeal is taken. Plaintiff challenged the bill, alleging that it "substantially

[3] Apparently under Arizona law, a referendum is required before a bill can become law where, as here, sufficient signatures against the bill are filed with the Secretary of State. See *Klahr* v. *Williams*, 289 F. Supp. 829 (Ariz. 1967).

disenfranchises, unreasonably and unnecessarily, a large number of the citizens of the state," App. 106, and "creates legislative districts that are grossly unequal." App. 108. Plaintiff at that time submitted his own plan for the court's consideration. Plaintiff's primary dispute with the new plan was that it substantially misconceived the current population distribution in Arizona. The court agreed that plaintiff's plan, which utilized 1968 projections of 1960 and 1965 Arizona censuses, could "very likely [result in] a valid reapportionment plan" but it declined to implement the plan, since it was based on census tracts, rather than the existing precinct boundaries, and "the necessary reconstruction of the election precincts could not be accomplished in time" to serve the 1970 election, whose preliminary preparations were to begin in a few weeks. *Klahr* v. *Williams*, 313 F. Supp. 148, 150 (Ariz. 1970). At the same time, the court observed that its 1966 plan had fallen behind contemporary constitutional requirements, due to more recent voter registration data (which increased the deviation between high and low districts to 47.09%) and the intervening decisions of this Court in *Kirkpatrick* and *Wells*, *supra*, and *Burns* v. *Richardson*, 384 U. S. 73 (1966).

Turning to the legislature's plan, the court found it wanting in several respects. First, though the result indicated population deviation between high and low districts of only 1.8%, the population formula used [4] did

[4] "The population factor in each of the election precincts comprising part of a legislative district was obtained by instructing the computer to take the 1968 voter registration for the precinct and divide it by the 1968 voter registration for the county in which the precinct was located, thereby obtaining the percentage of registered voters of the county residing within the precinct. The computer was then directed to multiply that percentage figure by the 1960 census for the county in which the precinct was located, thereby obtaining the population factor for the precinct." 313 F. Supp., at 151–152.

not "truly represent the population within [the] precincts in either 1960 or 1968," and thus "the figures produced . . . are not truly population figures." *Id.*, at 152. Second, the computer which devised the plan had been programmed to assure that the plan would not require any incumbent legislator to face any other incumbent for re-election. Third, the programming gave priority to one-party districts over districts drawn without regard to party strength. The court held that "the incumbency factor has no place in any reapportionment or redistricting" [5] and found "inapposite" the "consideration of party strength as a factor. . . ." *Ibid.*

The court was thus faced with a situation where both its 1966 plan and the legislature's latest attempt fell short of the constitutional standard. At that time, however, the 1970 elections were "close at hand." The court concluded that another legislative effort was "out of the question" due to the time and felt that it could not itself devise a new plan without delaying primary elections, "a course which would involve serious risk of confusion and chaos." *Ibid.* It considered plaintiff's plan for at-large elections, but the prospect of electing 90 legislators at large was deemed so repugnant as to be justified only if the legislature's actions had been "deliberate and inexcusable"; the court instead believed that the large population increase in Arizona since the last reliable census in 1960 was more to blame. Concluding that the 1970 elections would be the last to be held before the 1970 census data became available for new plans, the court chose what it considered the lesser of two evils and

[5] Though we noted in *Burns* v. *Richardson*, 384 U. S. 73, 89, n. 16, that "[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness," it is sufficient to note here that the District Court did not base its decision solely on this factor.

ordered the elections to be conducted under the legislature's plan. In its order to this effect, the court noted that it "assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment," but that "[u]pon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief." *Id.*, at 154.

The State did not seek review of the District Court's judgment declaring Chapter 1 unconstitutional. Plaintiff Ely, however, appealed to this Court. His notice of appeal was filed on June 18, 1970, his jurisdictional statement on August 17, 1970. The latter presented the single question whether it was error for the United States District Court to refuse to enjoin the enforcement of the Arizona Legislature's most recent effort to reapportion the State. Appellee's motion to dismiss or affirm was filed on November 24. We noted jurisdiction on December 21, 400 U. S. 963.

Meanwhile, the 1970 elections were held in accordance with the District Court's decree. Appellees suggest that the issue presented is moot and appellant concedes "the 1970 general election has already been held so that that aspect of the wrong cannot be remedied." Brief, p. 8. But appellant now argues that however that may be, the District Court should now proceed to adopt a plan of reapportionment which would be displaced only upon the adoption of a valid plan by the legislature. Appellant doubts that postponing judicial action until after November 1 will give the District Court sufficient time, prior to June 1972 when the election process must begin in Arizona, to consider the legislative plan and to prepare its own plan if the legislative effort does not comply with the Constitution. The feared result is that another election under an unconstitutional plan would be held in Arizona.

Reapportionment history in the State lends some substance to these fears, but as we have often noted, districting and apportionment are legislative tasks in the first instance,[6] and the court did not err in giving the legislature a reasonable time to act based on the 1970 census figures which the court thought would be available in the summer of 1971. We agree with plaintiff that the District Court should make very sure that the 1972 elections are held under a constitutionally adequate apportionment plan. But the District Court knows better than we whether the November 1 deadline will afford it ample opportunity to assess the legality of a new apportionment statute if one is forthcoming and to prepare its own plan by June 1, 1972, if the official version proves insufficient. The 1970 census figures, if not now available, will be forthcoming soon; and appellant, if he is so inclined, can begin to assemble the necessary information and witnesses and himself prepare and have ready for submission what he deems to be an adequate apportionment plan. Surely, had the plaintiff prepared and had ready a satisfactory substitute for Chapter 1 held unconstitutional by the District Court, the court would have ordered the 1970 elections held under that plan rather than the invalid legislative scheme. And surely if appellant has ready for court use on November 1, 1971, a suitable alternative for an unacceptable legislative effort, or at least makes sure that the essential information is on hand, there is no justifiable grounds for thinking the District Court could not prior to June 1, 1972.

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[6] *E. g., Reynolds* v. *Sims*, 377 U. S. 533, 586 (1964):

"[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."

complete its hearings and consideration of a new apportionment statute and, if that is rejected, adopt a plan of its own for use in the 1972 elections. Nor do we read the District Court decree as forbidding appellant from petitioning for reopening of the case prior to November 1, 1971, and presenting to the District Court the problem which it has now raised here but which we prefer at this juncture to leave in the hands of the District Court.[7] The judgment is affirmed.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result upon the premises set forth in his separate opinions in *Whitcomb* v. *Chavis*, *ante*, — U. S. —; *Oregon* v. *Mitchell*, 400 U. S. 112, 152 (1970); and *Reynolds* v. *Sims*, 377 U. S. 533, 589 (1964).

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[7] Appellant has contended here that the use of voter registration figures, rather than actual population, to determine district size operates to the detriment of the poor, blacks, Mexican-Americans, and American Indians. In light of our disposition of this case, we need only advert to our admonition in *Burns* v. *Richardson*, *supra*, that use of voter registration as a basis may "perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process," 384 U. S., at 92, and is allowable only if it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.*, at 93. We presume, of course, that any plan submitted, and certainly any plan approved by the District Court, will be faithful to this requirement.

SUPREME COURT OF THE UNITED STATES

No. 548.—October Term, 1970

Herbert L. Ely, Individually and as Chairman of the Democratic Party of Arizona, Appellant, *v.* Gary Peter Klahr et al.	On Appeal From the United States District Court for the District of Arizona.

[June 7, 1971]

Mr. Justice Douglas, with whom Mr. Justice Black joins, concurring.

The complaint in this case was filed on April 27, 1964. The District Court stayed all proceedings on June 25, 1964, until after the next regular session of the legislature and, when nothing was achieved, stayed them again until after a special session. A reapportionment plan produced by that legislature was held unconstitutional. 250 F. Supp. 537.

Thereupon the District Court drew a "temporary and provisional" plan for the general elections of 1966 and 1968. See 254 F. Supp. 997; 289 F. Supp. 827; 303 F. Supp. 224. In 1967 the legislature produced another plan which was approved by the voters and became effective January 17, 1969. This plan was also declared unconstitutional by the District Court on July 22, 1969. The legislature then adopted a new plan effective January 22, 1970. The District Court allowed this plan to be used for the 1970 general election, although it considered the plan to be unconstitutional. The District Court in its decree provided:

> "The court, having been advised that detailed population figures for the State of Arizona will be available from the official 1970 census by the summer of 1971, assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment for both houses of the Arizona Leg-

islature and a valid plan of redistricting the congressional districts of Arizona. Upon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief."

The District Court also retained jurisdiction of the cause. 313 F. Supp. 148.

Since *Reynolds* v. *Sims*, 377 U. S. 533, Arizona has not had a constitutionally valid apportionment plan. Members of the Arizona Legislature who were elected in the 1970 election were elected under a plan the District Court held unconstitutional. Under that plan a computer was instructed to redistrict the State and to accomplish, in order, the following objectives: (1) to make the districts as equal in population as possible; (2) to circumscribe the districts in such a way that each included one incumbent senator and two incumbent representatives; (3) to make the districts compact; and (4) to make districts politically homogeneous.

Even assuming the legislative districts were of equal population the plan would have several practical deficiencies as far as minority representation goes. The 1970 plan insured that no incumbent would be running against another incumbent, as often may happen under a reapportionment plan. Thus the opportunity for preserving the status quo was assisted.

An effort to make each district politically homogeneous compounded this problem. The record provides a new definiton of gerrymandering. A gerrymandered district in Arizona is not one where a "natural" majority finds its power erased by either moving lines to increase the numbers of the opposition in the district or by moving the lines so that a majority is dispersed. In Arizona a gerrymandered district came to be one that is not overwhelmingly either Republican or Democratic. Thus when the second and fourth factors are combined an incumbent had not only the natural benefits of incum-

bency, but also the benefits (where possible) of a one-party district, his own fiefdom.

The record reveals that the 1970 plan heavily favored incumbents even if we assumed equal protection districts. Such an assumption, of course, is contrary to the facts; deviations in Arizona ranged from about 24% above the median to about 52% below the median.

The basic unit for a district was the local political precinct. Unfortunately there were no population figures for the basic unit thus making it difficult to build the districts. Such figures were created by programing the computer to assume that a precinct population was that part of the 1960 county population which the number of registered voters in the precinct in 1968 bore to the number of registered voters in the county in 1968.

If all segments of society were equally likely to register to vote, then the Arizona method of computing population would be unobjectionable. But all members of a community are not equally likely to register. For example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the statewide average.[1] Not only are the poor, the blacks, the chicanos, and the Indians less likely to register in the first place, they are also likely to have a higher rate of illiteracy among their members. Arizona law at the time of the decision below required a literacy test for voter registration. Ariz. Rev. Stat. Ann. §§ 16–101.A.4, 16–101.A.5. Naturally this compounded the problem of under-registration of minority groups.[2] While

[1] Hearing on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 406 (1969–1970).

[2] Because of the Voting Rights Act of 1970 literacy tests will not be a factor in future elections. Section 201 bars a State from denying the right to vote in any federal, state, or local election because of "any test or device" which is defined, *inter alia*, to include illiteracy. This part of the Act was upheld in *Oregon* v. *Mitchell*, 400 U. S. 112.

the present record lacks some basic statistics, we do know that in 1965 the Bureau of Census determined that less than 50% of the residents of voting age were registered or voted in the 1964 Presidential election in Apache County, Navajo County, and Coconino County. 30 Fed. Reg. 9897, 14505. Under § 4 (a) of the Voting Rights Act of 1965 the application of the literacy tests was suspended by the publication of the statistics in the Federal Register, but the suspension was lifted a year later on the showing that the literacy tests had not been used in a discriminatory manner. *Apache County* v. *United States,* 256 F. Supp. 903. As of last fall Yuma County was subject to the literacy test ban of the Voting Rights Act of 1965. See *Oregon* v. *Mitchell,* 400 U. S. 112, 131 n. 12.

The 1970 plan adversely affected minorities. Because of the registration statistics used, one district in the Phoenix ghetto had approximately 70,000 residents while an affluent all-white district in another area of Phoenix had only 27,000 residents. The Indian reservation area in northeastern Arizona fared little better. While it had sufficient numbers of Indians to justify a separate district which could undoubtedly elect Indians to represent the Indians in the state legislature, the Indians were done in. At the time of this suit there were no Indians elected to either the State House or Senate. But just to the south of the area two state senators lived 10 miles apart. Hence the incumbency rule was invoked to split the Indian area so as to accommodate the two white senators.

The Arizona Legislature has yet to develop a reapportionment plan which can pass constitutional muster. The incumbents who now have the opportunity to draft the plan come from districts which are malapportioned and overrepresent the white vote. A valid apportionment plan will seemingly mean the defeat of several incumbents. The new efforts to gerrymander the State

for the members of the current legislature will doubtless be prodigious. Members of the 1970 legislature had the twin advantages of running as single incumbents and in politically homogeneous districts. Members of minority groups had the disadvantage of underrepresentation. That invidious discrimination still exists.

On oral argument it was said that there is no point in initiating the design of a reapportionment plan now because the 1970 census figures are not available. That argument is difficult to comprehend, for it appears [3] that in March 1971 New Jersey completed a comprehensive reapportionment plan based on the 1970 census. The District Court has shown great patience and has been perservering. It probably is the first to realize that the Gordian Knot must be cut if there is to be a plan that satisfies constitutional requirements.

It has indicated it will wait until November 1, 1971, before it initiates a constitutional plan. The hearings on such a plan will doubtless be long-drawn out and extensive. The prize is great, for if the present incumbents can prolong matters, the 1972 election may come and go with the existing invalid 1970 plan in effect. It is not difficult to imagine how easy that strategy might be. The 1972 primaries in Arizona are in September.[4]

Primaries apart, there is always the problem of review by this Court. We are plagued with election cases coming here on the eve of elections, with the remaining time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented. If an election case is filed in our summer recess, we will not consider it until the first week in October; and our effort to note the appeal, hear the

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[3] N. Y. Times, March 24, 1971, p. 47.

[4] The primary election in Arizona in 1972 will be held on September 13th. See 6 Ariz. Rev. Stat. Ann. § 16–702.

case, and decide it before November without disrupting the state election machinery is virtually impossible. The time needed is lacking.[5]

[5] *Williams* v. *Rhodes*, 393 U. S. 23, was an exceptional case. There MR. JUSTICE STEWART acting as Circuit Justice and in consultation with available members of this Court granted injunctive relief ordering the election ballots printed in such a way as to include the American Independent Party, the losing party in the District Court. This was to insure that, if they prevailed here, relief would be available. 21 L. Ed. 2d 69; 89 S. Ct. 1. An expedited briefing schedule was authorized and we heard oral argument as soon as the Term commenced. Two weeks later our opinion was handed down reversing the District Court. Had not MR. JUSTICE STEWART granted the injunction in September the appellant's victory would have been a hollow one.

A challenge to Colorado's durational residency requirement prior to the 1968 election did not fare as well. The District Court upheld the requirement and we heard oral argument after the election was over. The case was dismissed as moot. *Hall* v. *Beals*, 396 U. S. 45.

Durational residency requirements have come before the Court several times this Term. In *Hayes* v. *Gill*, No. 1218, there was a challenge to the Hawaii durational residency requirement for candidates. The Hawaii Supreme Court upheld the law in late August. An application for an injunction was denied. When the appeal finally came up for consideration on the merits, again after the election, it was dismissed as moot. In *Sirak* v. *Brown* a state durational residency requirement for voters was upheld and, when this Court denied an injunction, the plaintiff chose not to docket his appeal, probably on the basis of *Hall* v. *Beals*. A similar issue was present in *Fitzpatrick* v. *Chicago Board of Election Commissioners* where we denied a motion to expedite the appeal. Had all the lower courts followed *Drueding* v. *Devlin*, 234 F. Supp. 721 (Md. 1964), aff'd 380 U. S. 125, then mootness might have prevented any plenary review of the issue. But several district courts have concluded that subsequent decisions have undermined *Drueding* and thus have invalidated durational residency requirements. This avoids the mootness issue and we have noted probable jurisdiction in one such case. *Ellington* v. *Blumenstein*, No. 769.

In *Beller* v. *Kirk* there was a challenge to the Florida requirement demanding an independent candidate obtain 5% of the registered voters to sign a petition so that he could get on the ballot. We

If a case is to be heard and decided on these important issues it must be here by February so that we can work it into our spring calendar of argued cases and decide it before July. If the District Court waits until November to hold hearings and put a reapportionment plan in operation, it is unlikely that any such schedule can be met.

It is, therefore, essential that the judicial machinery be put into motion soon, so that a resolution of a matter that has defied solution for seven years be no longer delayed. I write these words not in criticism of the District Court but in support of its steadfast efforts to bring this stubborn litigation to an early end.

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denied injunctive relief early in October, but the case has subsequently been docketed *sub nom. Beller* v. *Askew*, No. 1360. We have heard oral argument on the same issue in *Jenness* v. *Fortson*, No. 5714.

The Ohio laws were involved in several cases pending this Term. In one, the District Court handed down its decision late in July 1971. By that decision several sections of the Ohio laws were invalidated and we noted probable jurisdiction. *Rhodes* v. *Sweetenham*, No. 1104. A loyalty oath was upheld and we noted probable jurisdiction in that case. *Socialist Workers Party* v. *Rhodes*, No. 814. The court also upheld a provision requiring independent candidates to file at the same time as major party candidates. *Sweetenham* v. *Rhodes*, No. 790. A similar issue is also presented in *Pratt* v. *Begley*, No. 1044, where the District Court made its ruling in early October.

The forthcoming Chicago election in April 1971 also presented cases where one of the parties needed immediate action. In *Jackson* v. *Ogilvie*, No. 1341, the issue is the requirement that an independent obtain 5% of the registered voters on a nominating petition. We denied a stay on February 22, 1971, and there is no way the case could be heard prior to the election.

Through all these cases *Williams* v. *Rhodes* stands out as exceptional, because both the necessary preargument injunctive relief and expedited oral argument were obtained.